

GLOBAL ADMINISTRATIVE LAW MEETS “SOFT” POWERS: THE UNCOMFORTABLE CASE OF INTERPOL RED NOTICES

NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS (JILP), Vol. 43:2 (2010)
[forthcoming]

MARIO SAVINO*

INTRODUCTION. INTERPOL AND PUBLIC LAW.....	2
PART I. SETTING THE SCENE	6
I.1. The nature of Interpol	6
I.2. Functional needs: the imperatives of international police cooperation.....	10
I.3. Normative concerns: neither “transmission belt”, nor “interest representation”	15
PART II. INTERPOL AND “SOFT” ADMINISTRATIVE POWERS	19
II.1. Red notices: basic features	21
II.2. The Kazakh case (I): the impact on personal freedom	24
II.3. Red notices as “soft” international administrative acts	28
PART III. RED NOTICES AND LEGAL ACCOUNTABILITY	32
III.1. The Kazakh case (II): the administrative control	36
III.1.1. <i>Ex ante</i> scrutiny	37
III.1.2. <i>Ex post</i> review	44
III.2. The AMIA case: the political control.....	47
III.2.1. Diplomatic review	50
III.3. Any room for improvement?.....	54
III.3.1. The analytical framework: red notices and global administrative procedures	56
III.3.2. In search of a balance: due process in context.....	58
GLOBAL LEGAL STUDIES AND “SOFT” POWERS: THREE CONCLUSIONS	63

* Associate Professor of Administrative Law, Tuscia University of Viterbo; Global Eastman Research Fellow, Hauser Global Law School Program, New York University (2008-9 a.y.). I thank Stefano Battini, Francesca Bignami, Armin von Bogdandy, Iris Canor, Sabino Cassese, Matthias Goldmann, Benedict Kingsbury, Richard Stewart, Joseph Weiler and David Zaring, as well as the participants in the Global Forum at NYU School of Law, for their comments on an earlier version of this paper. Many thanks also belong to Yaron Gottlieb (Counsel, Interpol) and the Secretariat of the Commission for the control of Interpol’s files (CCF) for detailed comments on a previous draft and for patiently introducing me to the technicalities that govern Interpol processing of red notices. Finally, I gratefully acknowledge financial support from the NYU Hauser Global Program. The usual disclaimer applies.

Introduction. Interpol and public law

Interpol is a dubious legal object.¹ With its 188 members, it is the second largest international entity after the United Nations. It plays a crucial role in facilitating the cooperation between national police forces and in supporting the global fight against transnational crime, terrorism included. Thanks to Interpol's efforts, in some countries it is already possible for a custom agent or a police patrol to check in real time whether a passport, a car or a precious canvas have been stolen. Doubtless, Interpol is contributing to make our world a safer place to live.

Despite its growing importance, Interpol is still structured in many respects as an informal network of national officials. It is established outside an intergovernmental convention. Part of its activities is informal and based on non-binding rules. The fundamental principle is voluntary participation and cooperation of its members. Judicial review is absent and political control is, at best, quiescent.² What is the rationale behind the "de-formalization" of activities that, when performed domestically, are bound by strict legal requirements and exercised by command-and-control administration?

The most likely answer points to the governance *ethos* that inspires Interpol's institutional trajectory and police cooperation in general. In Europe, for instance, the first experience of police cooperation goes back to 1975, when an informal and remote network of national officials – the so-called Trevi Group – was established at Community level. It took almost seventeen years to

¹ Similarly, Deirdre Curtin, *EU Police Cooperation and Human Rights Protection: Building the Trellis and Training the Vine*, in SCRITTI IN ONORE DI GIUSEPPE FEDERICO MANCINI, Vol. II. 277, 235 (A. Barav et al. eds., 1998) (including Interpol among the "unidentified international organizations").

² On Interpol's legal and political accountability, James Sheptycki, *The Accountability of Transnational Policing Institutions: The Strange Case of Interpol*, 19 CAN. J.L. & SOC. 107 (2004); Charles R. Both, *International Police Force or Tool For Harassment of Human Rights Defenders and Political Adversaries: Interpol's Rift with the Human Rights Community*, 8 ILSA J. INT'L & COMP. LAW 357 (2001-2002); Malcolm Anderson, *Interpol and the Developing System of International Police Cooperation*, in CRIME AND LAW ENFORCEMENT IN THE GLOBAL VILLAGE 89 (William F. McDonald ed., 1997); Fenton Bresler, *INTERPOL* (1992); Malcolm Anderson, *POLICING THE WORLD: INTERPOL AND THE POLITICS OF INTERNATIONAL POLICE COOPERATION* (1989); Michael Fooner, *INTERPOL: ISSUES IN WORLD CRIME AND INTERNATIONAL CRIMINAL JUSTICE* (1989).

bring this organizational platform out of the shadow of informality³ and sixteen more years to subject it to the reach of the rule of law.⁴ As observed, “[l]es policiers, hommes de terrain pragmatiques, recherchent avant tout l’efficacité”.⁵

Law, in this governance perspective, is conceived as instrumental: its legitimacy rests on the ability to create or strengthen effective tools of governance. Therefore, if decision-makers (in the specific case, almost all the domestic police forces of the world) agree about the ends to pursue and the means to employ, then law becomes a secondary concern, superfluous and perhaps even damaging. Moreover, law is perceived as rigid, legal requirements as cumbersome, formalism as deleterious to the achievement of shared

³ Police cooperation was institutionalized at EU level in 1992, when the Maastricht Treaty established the “third pillar”, an area of intergovernmental cooperation including also border control, visa and immigration, and judicial cooperation in civil law and criminal law matters. On the early evolution of the third pillar, THE THIRD PILLAR OF THE EUROPEAN UNION: COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS (Joerg Monar and Roger Morgan eds., 1994); Eileen Denza, THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION 63-84 (2002); Steve Peers, EU JUSTICE AND HOME AFFAIRS LAW 10-20 (2006). Specifically on police cooperation, Malcom Anderson *et al.*, POLICING THE EUROPEAN UNION (2003), and John D. Occhipinti, THE POLITICS OF EU POLICE CO-OPERATION: TOWARD A EUROPEAN FBI? (2003).

⁴ With the entering into force of the Lisbon Treaty on 1 December 2009, the remaining part of third pillar (already partially “absorbed” in the Community pillar following the 1997 Amsterdam Treaty) has been abolished: criminal law and police cooperation have become shared competences of the European Union. Thus, EU action in these fields is now bound by the European Charter of fundamental rights and is subject to the scrutiny of the European Court of Justice and to parliamentary oversight (Articles 67, 70, 85 and 88 of the Treaty on the functioning of the European Union). As a result, the main traditional concerns with the third pillar – the lack of transparency and democratic control, as well as the predominance of the security logic over the protection of rights (e.g., Sionaidh Douglas-Scott, *The Rule of Law in the European Union. Putting Security into “The Area of Freedom Security and Justice”*, 29 EUROPEAN LAW REVIEW 219 (2004)) – are now, in principle, overcome. For this view, Estella Baker and Christopher Harding, *From past imperfect to future perfect? A longitudinal study of the Third Pillar*, 34 EUROPEAN LAW REVIEW 25 (2009).

⁵ Michel Richardot, *Interpol, Europol*, 102 POUVOIRS 77 (2002). Similarly, Nadia Gerspacher, *The history of international police cooperation: a 150-year evolution in trends and approaches*, 9 GLOBAL CRIME 169, 183 (2008), affirming that “police officers have begun voluntarily to adopt a policy of mutual aid, using whichever mechanism is better likely to maximize their success.”

goals. In short, when law is not necessary to lead into the purposes of a certain institution, there is no reason to “legalize” that institution.⁶

Unsurprisingly, lawyers tend to reject this vision. Global governance conflates private and public phenomena, formal and informal rules, national and international institutional settings, making authoritative and non-authoritative powers virtually undistinguishable.⁷ To recover from such an unhealthy conflation, that threatens the civilizing expansion of the rule of law beyond the state, legal scholars increasingly plead for the use of public law at international level: its lenses, as carefully forged by domestic experience, make those dividing lines again visible.⁸ While the governance mindset is skewed to the idea that the end can justify the means, legal scholars contend that this output legitimacy “is a weak legitimacy and sometimes none at all”.⁹ To amend that vision, public law can happily perform its traditional limiting function also on the global stage, by imposing its substantive and procedural standards, thereby checking international unilateral powers that affect individual liberties.¹⁰ The underlying belief is that law – and more

⁶ Martti Koskeniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241, 249 (2004), captures this view as follows: “After all, international law is just a set of diplomatic compromises made under dubious circumstances for dubious objectives. We use it if it leads into valuable purposes. And if it does not lead us into those purposes - well - then that is all the worse for law”.

⁷ E.g. Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 369 (2000-2001).

⁸ A strong call to redefine and enhance the role of public law at international level is offered in Armin von Bogdandy, Philipp Dann and Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN LAW REVIEW 1375 (2008). See also, Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 9 GERMAN LAW JOURNAL 1909, 1914 (2008). For a skeptical view, Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 187 (2006). For a restatement of the global administrative law perspective on the issue, Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 23 (2009), and Sabino Cassese, *Is There a Global Administrative Law?*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS* 761 (Armin von Bogdandy *et al.*, 2010).

⁹ J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 ZAÖRV 547, 562 (2004).

¹⁰ This is also one of the basic assumptions of the global administrative law

accurately public law – is the most appropriate way to address normative concerns about the legitimacy of governance activities.¹¹

Assessed against this backdrop, the case of Interpol is particularly problematic. If good outcomes – the good service Interpol renders to global security – legitimate questionable means only so far, the first question that arises is whether, in Interpol’s armory, there is any such “questionable means”. To put it in public law terms: does Interpol exert unilateral administrative powers that affect individual rights? In the negative, the quest for legal accountability would be simply misplaced. In the positive, by contrast, the safeguard of citizens’ rights would require the introduction of legal guarantees.

In Part I of the paper, I set the stage. First, I try to ascertain the nature of Interpol – is it an international organization or a transgovernmental network? (I.1) Then, I try to detect Interpol’s main functional needs (I.2) and sources of accountability (I.3). In Part II, I address the question whether Interpol enjoys significant administrative powers. To this aim, I analyze the most relevant instrument of Interpol’s action, namely “red notices”. The answer will be neither black, nor white, but rather grey: I claim, in fact, that red notices represent a case of “soft” international administrative measures. The main problem sketched in this introduction, thus, will still be there: do Interpol’s “soft” instruments deserve legal consideration at all? If administrative powers are not *formally* binding (“hard”), but only *substantially* so (“soft”), is there any real need to make them legally accountable? My answer – developed in Part III – will be shaped in a “yes, but” mood: yes, “soft” administrative powers require legal accountability, *but*, at the same time, their “softness” should be taken seriously: it urges equally “soft” mechanisms of accountability. By taking “softness” seriously – this will be my last claim – Global Administrative Law paves the

project. See Benedict Kingsbury, Nico Krisch and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 15 (2005); Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 663 (2005); Stefano Battini, *International Organizations and Private Subjects: A Move Toward A Global Administrative Law?*, IILJ Working Paper 2005/3.

¹¹ The tendency of legal scholars to consider international law anything with an international dimension is emphasized by D.J. Bederman, *What is wrong with International Law Scholarship*, 1 CHICAGO JOURNAL OF INTERNATIONAL LAW 81 (2000).

way for a pragmatic approach to legal accountability: an approach that aims to reconcile the functional needs vindicated by the governance *ethos* with the normative concerns raised by public international law scholars.

PART I. SETTING THE SCENE

I.1. The nature of Interpol

In 1923, Heinrich Triepel was defending his dualistic theory of separation between international law and domestic law in these terms: “Certainly, it is possible that a future evolution may produce a new international law that recognizes some social groups within the current states as independent international subjects (...). While we wait, we shall maintain our theory”.¹² Somewhat ironically, the same year an international entity – the International Criminal Police Commission (ICPC) – was established not as an inter-state creation, but rather as a private association under Austrian law. The ICPC resulted from an agreement between police officers of twenty-four states (mostly European, with the US involvement).¹³ After fifteen years of Austrian domination, both in terms of funding and manpower, the ICPC was taken over by the Nazis in 1938, revived in 1946 by seventeen states under the French lead, and re-established as International Criminal Police Organization or Interpol in 1956. Its headquarters, originally located in Vienna, were moved to Saint-Cloud (near Paris) in 1946 and then, in 1989, to Lyon.¹⁴

The legal nature of Interpol has been long debated. Its statute is contained in the 1956 Constitution, which was adopted by the Interpol General Assembly and, thus, conceived as an agreement between the heads of national police forces.¹⁵ Despite the lack of a

¹² Heinrich Triepel, *Les rapports entre le droit interne et le droit international*, RECUEIL DES COURS 82 (1923).

¹³ Mathieu Deflem, POLICING WORLD SOCIETY 124 (2002).

¹⁴ On the European origins of international crime control, also with specific reference to Interpol, Peter Andreas and Ethan Nadelmann, POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS 59, 87-96 (2006). See also Mathieu Deflem, “*Wild Beasts Without Nationality*”: *The Uncertain Origins of Interpol, 1989-1910*, in HANDBOOK OF TRANSNATIONAL CRIME & JUSTICE 275-285 (Philip Reichel ed., 2005).

¹⁵ However, Interpol's view is that its Constitution is an agreement in simplified form: the decision to become a party to Interpol stems – in conformity with Articles 4 and 45 of the Constitution – from a decision by the appropriate governmental authorities that, in the light of the 1969 Vienna Convention, commit the state within the international order. This view draws on the

formal treaty basis, Interpol – so the standard account runs – has gradually come “to be recognized as a public international organization” because of “its participation in the U.N. and Council of Europe business, its mention in a number of international treaties concerning mutual legal assistance, American recognition of it as an international organization by Presidential Order in 1983 (which granted legal immunities in the U.S.), and other, less important, legal instruments.”¹⁶ Accordingly, Interpol enjoys customary recognition in international law as an intergovernmental organization.¹⁷

In effect, Interpol possesses the typical attributes of an international organization. To begin with, it has permanent headquarters (since 1984)¹⁸ and permanent institutions. The General Assembly, the main decisional body, composed of all the national

decision of the International Court of Justice in the *Qatar v. Bahrain* case (ICJ, *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain*, Jurisdiction and Admissibility (July 1, 1994)), confirming an extremely flexible and broad interpretation of the notion of international agreement in the Vienna Convention on the Law of Treaties and asserting that the basic criterion for determining the will of the states concerned is to determine their intention. On informal international agreements, O. Schachter, *The Twilight Existence of Non-Binding International Agreements*, 71 AJIL 296 (1977); A. Aust, *The Theory and Practice of Informal International Instruments*, 35 ICLQ 787 (1986); C. Lipson, *Why Are Some International Agreements Informal?*, 45 INTERNATIONAL ORGANIZATIONS 495 (1991). See also A. T. Guzman, *The Design of International Agreements*, 16 EJIL 579 (2005).

¹⁶ Anderson, *Interpol and the Developing System of International Police Cooperation*, *supra* note 2, at 93. See also Anderson, *POLICING THE WORLD*, *supra* note 2, at 71; Bresler, *INTERPOL*, *supra* note 2, at 131; Fooner, *INTERPOL*, *supra* note 2, at 45 (1989).

¹⁷ Interpol’s legal personality has been confirmed by the Administrative Tribunal of the International Labor Organization (ILOAT): “Interpol is an independent international organization; the parties cite no agreement and do not even mention the existence of any coordinating body that would warrant comparison (...) Interpol is not subject to any national law” [ILOAT, Judgment No.1080 of 29 January 1991]. The Organization’s international legal personality is also implicit in its accession in 2000 to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. *Contra* Sheptycki, *supra* note 2, at 115 and 117-123.

¹⁸ In 1984, an *ad hoc* Headquarters Agreement granted Interpol legal immunities in France.

delegations;¹⁹ the Executive Committee, apex of the executive branch, composed of 13 delegates that are elected by the general Assembly with due consideration to geographical balance; the Secretariat General, permanent administrative body implementing the decisions of the General Assembly and the Executive Committee under the responsibility of the Secretary General, whose appointment is proposed by the Executive Committee and approved by the General Assembly. Additionally, Interpol has field offices operating as peripheral arms in every member party, namely the National Central Bureaus (NCB).²⁰

Secondly, Interpol has a permanent staff²¹ whose independence is guaranteed by the Constitution.²² As in other international organizations, Interpol officials have the status of international civil servants and enjoy international protection.²³

Thirdly, despite the dubious existence of a legal duty, each member country has included in its national budget the financial contribution of the member responsible for representing it within the organization.²⁴ Thereby, Interpol receives regular (though not

¹⁹ The General Assembly shall make its decisions by a simple majority, except in those cases where a two-thirds majority is required (Article 13, Interpol Constitution).

²⁰ Additionally, Interpol has established a representative office at the United Nations in New York and at the European Union in Brussels, seven regional offices (four in Africa, two in Central/South America and one in Asia) to support local NCBs, and few specialized units dealing with specific transnational crimes that require additional international coordination, collection of data, tactical and strategic analysis. Interpol, *Interpol: An Overview*, 1 (Fact Sheet COM/FS/2010-01/GI-01, 2010) (<http://www.interpol.int/Public/ICPO/FactSheets/GI01.pdf>). See also Roraima Andriani, *Interpol: The Front Lines of Global Cooperation*, CRIME AND JUSTICE INTERNATIONAL 4, 8-9 (May/June 2007).

²¹ Interpol Secretariat General has 450 officials (one third seconded from member states) that carry out all the administrative tasks of the organization.

²² Article 30 of Interpol Constitution.

²³ As defined in the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1035 U.N.T.S. 167, 13 I.L.M. 41, entered into force February 20, 1977.

²⁴ In Interpol's view, even if one disregards the fact that each government submitted a request for membership and thus expressly consented to be bound by the Constitution, all the contracting parties have, by their acts and/or behaviour subsequent to the adoption of the Constitution, consented to its binding nature as an international legal instrument.

conspicuous) financial support from the members, with an annual budget of approximate 50 million euros.²⁵

Lastly, formal state membership should also be acknowledged. Despite the ambiguity of Article 4 of Interpol's Constitution concerning the accession procedure,²⁶ membership is attached to state governments, rather than to their police administrative units.²⁷

However, if one looks at the concrete operational dimension of Interpol, the metaphor of a network organization seems to capture its essential features much better than the traditional image of an international organization.²⁸ Interpol's decisions, in fact, are taken by national bureaucrats, rather than by diplomats or representatives of government. National police delegations gather together in the

²⁵ In 2010, Interpol's budget was 48.6 million euros. See Interpol, *Interpol: An Overview* 2 (2010), Fact Sheet COM/FS/2010-01/GI-01, available at <http://www.interpol.int/Public/ICPO/FactSheets/GI01.pdf>.

²⁶ Article 4 of Interpol's Constitution states: "Any country may delegate as a Member to the Organization any official police body whose functions come within the framework of activities of the Organization".

²⁷ Two arguments support this conclusion. First, when Interpol's General Assembly grants formal membership to new countries, its resolutions expressly attach the status of member to their governments (see, for instance, Res. AG-2009-RES-01, granting membership to the government of Samoa). Secondly, member countries have systematically been represented at the sessions of Interpol's General Assembly by delegations led by heads of delegation that have been appointed by government authorities, in conformity with the procedure for verifying credentials set out in the Rules of Procedure of the General Assembly (Article 7). For the opposite view, Richardot, *supra* note 5, at 80 (observing that some of the most important member states still deny Interpol the character of intergovernmental organization, granting it only the association status of police services); Sheptycki, *supra* note 2, at 119.

²⁸ Admittedly, the traditional image of international organization is quite misleading. Most international organizations provide the formal framework for the establishment of transgovernmental bodies, often performing auxiliary tasks, as well as for the development of inter-administrative networks. For a first systematic study, Paul Reuter, P. Reuter, *Les organes subsidiaires des organisations internationales*, in HOMMAGE D'UNE GENERATION DE JURISTES AU PRESIDENT BASDEVANT 415 (1960). For a more recent attempt, Mario Savino, *The Role of Transnational Committees in the European and Global Orders*, 6 GLOBAL JURIST ADVANCES 3 (2006) (available at <http://www.bepress.com/gj/advances/vol6/iss3/art5/>). More generally, on the actual features of international organizations, José Alvarez, *International Organizations: Then and Now*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 324 (2006); José Alvarez, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 184 (2005); *INTERNATIONAL ORGANIZATIONS* (Jan Klabbers ed., 2005).

meetings of Interpol's main body and discuss the most effective ways to develop their action at the international level. Second, National Central Bureaus (NCBs) are regulated by their respective domestic law, but act as domestic extensions of Interpol, not of their government. They, in fact, implement Interpol's decisions, collect data that feed Interpol databases and engage in a permanent dialogue with their counterparts and with Interpol's Headquarters. In that respect, Interpol does not follow the state-as-a-unit paradigm, but rather the fragmented-state one. Therefore, it functionally resembles more an administration "based on collective action by transnational networks of governmental officials", than an "administration by formal international organizations".²⁹ Formally, Interpol is an international organization. Substantially, it follows the transgovernmental paradigm.³⁰

I.2. Functional needs: the imperatives of international police cooperation

²⁹ These are two of the five types of global administrative entity detected in Kingsbury, Krisch and Stewart, *supra* note 10, at 20-21.

³⁰ This paradigm was first detected and elaborated by Joseph S. Nye and Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, 25 INTERNATIONAL ORGANIZATION 329 (1971), Robert O. Keohane and Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POLITICS 39 (1974); see also TRANSNATIONAL RELATIONS AND WORLD POLITICS (Robert O. Keohane and Joseph S. Nye eds., 1970). Since then, two diverging views have emerged in the debate. Some scholars emphasize the institutional and functional advantages offered by transgovernmental networks: see Anne-Marie Slaughter, A NEW WORLD ORDER 171-194 (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Virginia Journal of International Law (2002); Anne-Marie Slaughter and David Zaring, *Networking Goes International: An Update*, 2 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 211 (2006); David Zaring, *Transgovernmental Relations*, in ENCYCLOPEDIA OF GLOBALIZATION (Jan-Aart Scholte ed. 2007). Other scholars, by contrast, tend to stress the problems of accountability that "government by transgovernmentalism" raises: see Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-liberalism*, 17 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 1014 (1996-97); Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUROPEAN JOURNAL OF INTERNATIONAL LAW 435 (1997); David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUROPEAN HUMAN RIGHTS LAW REVIEW 463 (2001).

With the end of the “cold war”, the immediate threat of a military confrontation between super-powers has been removed. Since then, the distinction between internal and external security has progressively lost significance. State security, at least in Europe and North America, is not threatened anymore by military action. It is threatened, rather, by political violence arising from complex criminal conspiracies – the classic domain of domestic policing. Is it still possible to identify that domain as “internal” security? The negative answer stems for the very simple fact that criminal activities increasingly stretch themselves beyond state borders and acquire a global dimension.³¹

This blurring between internal and external security has altered the dynamics according to which international police cooperation takes place, in at least two respects.

Firstly, universal police cooperation is not impeded anymore by the pre-existing western and eastern blocs divide. Rather, it is generally understood as beneficial and, indeed, necessary to detect the major sources of criminal activities, which have become transnational. As a consequence, international networks of police cooperation have spread, giving substance to the idea that “dark networks” of criminals need to be fought with “bright networks” of policemen.³²

³¹ On the increasing overlap between internal and external security and its implications, Derek Lutterbeck, *Blurring the Dividing Line: The Convergence of Internal and External Security in Western Europe*, 14 EUROPEAN SECURITY 231 (2005); Peter Andreas and Richard Price, *From War Fighting to Crime Fighting: Transforming the American National Security State*, 3 INTERNATIONAL STUDIES REVIEW 31 (2001); Didier Bigo, *When Two Become One: Internal and External Securitisations in Europe*, in INTERNATIONAL RELATIONS THEORY AND THE POLITICS OF EUROPEAN INTEGRATION: POWER, SECURITY AND COMMUNITY (M Kelstrup & M Williams eds., 2000). See also Mary Kaldor, *NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA* (1999).

³² Transnational networks have become a dominant structural feature of police cooperation beyond the state. See Nadia Gerspacher and Benoît Dupont, *The Nodal Structure of International Police Cooperation: An Exploration of Transnational Security Networks*, 13 GLOBAL GOVERNANCE 347, 361 (2007); Les Johnston, *Transnational Security Governance*, in DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY (Jennifer Wood and Benoît Dupont eds., 2006); Benoît Dupont, *Security in the age of networks*, 14 POLICING AND SOCIETY 76 (2004); Neil Walker, *The Pattern of Transnational Policing*, in HANDBOOK OF POLICING 111 (Trevor Newburn ed., 2003); James Sheptycki, *IN SEARCH OF TRANSNATIONAL POLICING* (2002); Didier Bigo, *POLICES EN*

However, national police administrations still retain all the most relevant law enforcement powers. States are reluctant to share them, police powers being understood as fundamental attributes of state sovereignty. When such reluctance turns into aversion, *bilateral* cooperation (instead of *multilateral*) is the preferred, though insufficient, state response. Therefore, the first imperative is to foster international police cooperation without eroding national sovereignty, that is, without threatening domestic police autonomy.³³

Secondly, international cooperation is not limited anymore to facilitate “low policing” (prevention of “ordinary crimes”), as it was the case in the past.³⁴ After September 11, most cooperative efforts include “high policing”, namely the prevention of terrorism-related crimes, which are, by definition, crimes based on political motivations. Interpol makes no exception. Despite the initial commitment not to deal with “political crimes”, consecrated in Article 3 of the 1956 Constitution, Interpol has gradually broadened the scope of its mandate in order to include terrorism. Its current strict relations with other international bodies – the UN Security Council and the OCSE Financial Action Task Force (fighting money-laundering activities related to terrorism) among others – put Interpol at the center of the global network engaged in the fight against international terrorism.³⁵

RÉSEAUX. L'EXPÉRIENCE EUROPEËNNE (1996); Ethan A. Nadelman, *Cops Across Borders: The Internationalization of US Criminal Law Enforcement* (1993).

³³ See, for a conceptualization of the tension between national and transnational police action, Ian Loader and Neil Walker, *Locating the Public Interest in Transnational Policing*, in CRAFTING TRANSNATIONAL POLICING: POLICE CAPACITY-BUILDING AND GLOBAL POLICING REFORM 111 (Andrew Goldsmith and James Sheptycki eds., 2007).

³⁴ Jean-Paul Brodeur, *High Policing and Low Policing: Remarks About the Policing of Political Activities*, 30 SOCIAL PROBLEMS 506 (1983).

³⁵ On international cooperation for anti-terrorist purposes, Ved P. Nanda, *Terrorism, International Law and International Organizations*, in LAW IN THE WAR ON INTERNATIONAL TERRORISM 1 (Ved P. Nanda ed., 2005); Barry A. Feinstein, *Combating Terrorism through International Law*, in FIGHTING TERRORISM IN THE LIBERAL STATE: AN INTEGRATED MODEL OF RESEARCH, INTELLIGENCE AND INTERNATIONAL LAW 48 (Samuel Peleg and Wilhelm Kempf eds., 2006); Nicole Deller, *The Prevention and Prosecution of Terrorist Acts: a Survey of Multilateral Instruments*, in THE IMPERIAL PRESIDENCY AND THE CONSEQUENCES OF 9/11: LAWYERS REACT TO THE GLOBAL WAR ON TERRORISM 414 (James R. Silkenat and Mark R. Shulman eds., vol. 2, 2007). See also the studies published in the following edited volumes: TERRORISM AS

This broadening in the scope of police cooperation bears relevant implications. Not only it requires the development of intelligence tasks, and thus the gathering at supra-national level of sensitive data (on political affiliation, religion, race, membership to suspect groups) that call for the protection of individual rights.³⁶ It also implies a reconfiguration of international police cooperation as a politically salient activity, dealing it with “political crimes”. In a context crossed by deep geopolitical tensions³⁷ and by divergent understandings of terrorist phenomena,³⁸ such a reconfiguration may easily induce states resistance and erode the basis for international cooperation. The second imperative of international police cooperation is, therefore, “de-politicization”.³⁹

A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? (Christian Walter *et al* eds., 2004); ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM (Andrea Bianchi ed., 2004); GLOBAL ANTI-TERRORISM LAW AND POLICY (Victor V. Ramraj ed., 2005); SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW (Paul Eden and Thérèse O'Donnell eds., 2005); INTERNATIONAL CRIMINAL LAW, VOL. II: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS (Mahmoud Cherif Bassiouni ed., 2008).

³⁶ See, for instance, in the European context, Francesca Bignami, *Privacy and Law Enforcement in the European Union: The Data Retention Directive*, 8 CHICAGO JOURNAL OF INTERNATIONAL LAW 233 (2007); Rocco Bellanova, *The “Prüm Process”: The Way forward for EU Police Cooperation and Data Exchange*, in SECURITY VERSUS JUSTICE?: POLICE AND JUDICIAL COOPERATION IN THE EUROPEAN UNION 203 (Elspeth Guild and Florian Geyer eds., 2008); Michele Nino, *The Protection of Personal Data in the Fight Against Terrorism: New Perspectives of PNR European Union Instruments in the Light of the Treaty of Lisbon*, 6 UTRECHT LAW REVIEW 62 (2010). For a broader comparative analysis, Stephan Sottiaux, *TERRORISM AND LIMITATION OF RIGHTS: THE ECHR AND US CONSTITUTION* (2008) (comparing the limitations of rights to freedom of expression, freedom of association, personal liberty, privacy and fair trial both in the European and US legal orders).

³⁷ One does not need to subscribe the “clash of civilizations” thesis to make such a general statement. The obvious reference is to Samuel P. Huntington, *The Clash of Civilizations*, 6 FOREIGN AFFAIRS 29 (1993).

³⁸ As the lack of an internationally accepted definition of “terrorism” shows. On the issue, *inter alia*, Mahmoud Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARVARD INTERNATIONAL LAW JOURNAL 93 (2002); Ben Saul, *DEFINING TERRORISM IN INTERNATIONAL LAW* (2006).

³⁹ See Mathieu Deflem and Lindsay C. Maybin, *Interpol and the Policing of International Terrorism: Developments and Dynamics since September 11*, in *TERRORISM: RESEARCH, READINGS, & REALITIES* 175 (Lynne L. Snowden and Bradley C. Whitsel eds., 2005); Michael Barnett and Liv Coleman, *Designing*

Interpol's ability to enforce this imperative has been the main source of its success. Because of its neutrality, consecrated in the Constitution,⁴⁰ almost all the countries of the world – both western and eastern, liberal and communist, Islamic and non-Islamic ones – despite their profound political divisions, accept to cooperate on police matters on the assumption that Interpol's ends are not politically biased but (merely) functionally oriented. This assumption is, now, under threat, because of the inclusion of terrorism-related crimes in Interpol mandate.

A telling anecdote is in order. After the Israeli offensive launched on the Gaza Strip between December 2008 and January 2009, rumors have been floating that Iran had requested Interpol to issue a red notice (i.e. an arrest warrant) against 15 Israeli officials, including outgoing Israeli prime minister Ehud Olmert, defense minister Ehud Barak and foreign minister Tzipi Livni for crimes committed during Tel Aviv's Operation Cast Lead in Gaza. On early March 2009, Interpol rejected the claim, asserting that Teheran had not asked the issuing of any red notices and that, in any event, "Interpol's Constitution strictly prohibits the Organization from making 'any intervention or activities of a political, military, religious or racial character'".⁴¹ Yet, news agencies reported Tehran's chief prosecutor announcing that the Iranian judiciary system had plans to request Interpol red notices for over 100 Israeli officials involved in the war on Gaza. Few days later Interpol admitted that it was reviewing an Iranian request to issue 25 red notices against Israeli officials.⁴² Eventually, none of the red notices requested by

Police: Interpol and the Study of Change in International Organizations, 49 INTERNATIONAL STUDIES QUARTERLY 593 (2005).

⁴⁰ According to Article 3 of the Interpol Constitution, "[i]t is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character."

⁴¹ Interpol press release, *Interpol issues denial of reported Iranian request seeking arrest of 15 senior Israeli officials*, 2 March 2009 (all the press releases mentioned hereinafter are available at <http://www.interpol.int/Public/News/news2010.asp>).

⁴² Some embarrassment emerges from Interpol press release, *Interpol statement on Iranian request for issue of Red Notices*, 10 March 2009: "While Interpol would not ordinarily comment on member country requests for the issue of Red Notices, as Iranian government officials have made their request public and provided information to the media, the General Secretariat has released the following statement: 'The Interpol General Secretariat headquarters in Lyon, France, on Saturday 7 March received a message from Iranian authorities

Iran was upheld, arguably – silent Interpol – because Interpol office of legal affairs deemed the request incompatible with Article 3 of Interpol’s Constitution, which prohibits the organization from making “any intervention or activities of a political, military, religious or racial character”.

As this episode makes clear, in the case of Interpol the imperative of neutrality is both illusory and cogent. It is illusory, because terrorism and related crimes are by definition political. Yet, it is more cogent than ever, because, amid the “clash of civilizations”, neutrality is the only available *passepourtout* for a truly global police cooperation. In short, Interpol cannot be really a-political, because no institution can be. Interpol can only mask its ideology. And, in the era of the fight against international terrorism, it has to.

I.3. Normative concerns: neither “transmission belt”, nor “interest representation”

Before analyzing Interpol’s administrative powers and legal accountability,⁴³ it seems appropriate to put Interpol in context and address the more general question “to whom this global administration is accountable”. The question can be addressed in many different ways, depending on the conceptual and methodological standpoint one adopts.⁴⁴ I start from the simplified

requesting the issue of 25 Red Notices for senior Israeli officials in relation to the Gaza offensive in December and January. In accordance with the Organization’s rules and regulations this request is now being studied by Interpol’s Office of Legal Affairs in order to determine whether it conforms with the Constitution and specifically Article 3 which strictly prohibits the Organization from making ‘any intervention or activities of a political, military, religious or racial character’. Until this thorough review is complete, it would be inappropriate for the General Secretariat to comment further.”

⁴³ *Infra*, Part II and III.

⁴⁴ In this part of the paper, I borrow the conceptual framework from Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AMERICAN POLITICAL SCIENCE REVIEW 29 (2005). Accordingly, *accountability* “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met”, while the concept of *legitimacy* refers to the set of standards according to which the power-wielder can be judged and subject to sanction.

assumption that administrative accountability mainly (albeit not exclusively) rests on two basic mechanisms, namely “transmission belt”, or control from the political branch of the executive, and “interest representation”, or control by those who are regulated.⁴⁵ The roots of these mechanisms can be traced back, respectively, to the “delegation” model of accountability and to the “participation” one.⁴⁶

The classic rule, rooted in the dualist state-centric paradigm, is that international organizations have the authority to act in the international arena *if and because* states explicitly confer the required authority on them. This rule is instrumental to accountability: the act of delegation, being formal, presupposes both a decision of the government and the parliamentary scrutiny. In turn, domestic governments and parliaments, as “principals”, are entitled to enact various forms of political control in order to check the power conferred on the international “agent” and to prevent its abuse.⁴⁷

In the case of Interpol, this “delegation” model of accountability seems not to be properly in place. Absent an explicit act of delegation (a formal treaty), there is no formal principal. Delegation is, at best, implicit. This situation weakens the typical form of accountability on the international stage: domestic “transmission belt” is formally disconnected and substantially stretched. Governments may only exert an indirect control on the international organization by means of their national delegations. Delegates (should) receive instructions from the capital before participating to

⁴⁵ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARVARD LAW REVIEW 1669 (1975). See also Kingsbury, Krisch and Stewart, *supra* note 10, at 31-35, distinguishing two basic sources of accountability of global administration, via domestic institutions and via internal mechanisms of control and participation; Richard B. Stewart, *U.S. Administrative Law: A model for Global Administrative Law?*, 68 LAW AND CONTEMPORARY PROBLEMS 63 (2005), providing a rich illustration of accountability mechanisms, grouped by “top down” and “bottom up” approaches to global administrative law; Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 247, 253-6 (2006), claiming that national, international and cosmopolitan groups all contribute, as constituencies of global regulatory governance, to make international administrations accountable.

⁴⁶ Grant and Keohane, *supra* note 44, at 30-33.

⁴⁷ See also, more generally, Kenneth Abbott and Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 JOURNAL OF CONFLICT RESOLUTION 3 (1998).

the relevant international meeting and afterwards (should) report back to the government.⁴⁸

The case of Interpol is even more complex. At domestic level, the usual substitute for (or complement of) “transmission belt” is the “interest representation” model. It is based on the idea of participation as a suitable accountability mechanism for independent administrations. Accordingly, the performance of the power-wielder is evaluated – absent its “principals” – by those who are affected by its actions. This solution has been consistently experienced in the domestic arenas with regard to independent regulatory agencies, which are typically removed from the direct control of the government.⁴⁹ The same solution may prove to be apt to those international bodies that, like Interpol, operate as autonomous transgovernmental networks. Indeed, the introduction of transparency and notice-and-comment mechanisms has been adopted by many global administrations and it is increasingly advocated as the most appropriate tool to compensate for the lack of political control over international regulatory networks.⁵⁰ Can’t we recommend the same solution for the case of Interpol?

Unfortunately, we cannot. Here lies the specificity of the case. The main obstacle is represented by the kind of functions carried out by Interpol. First, it is responsible for the publication and circulation of different types of notices, concerning arrest warrants of suspect criminals, requests to freeze suspect terrorists’ assets, exchange of

⁴⁸ The accountability problem posed by transgovernmental bodies was first detected in the 1970s by Karl Kaiser, *Transnational Relations as a Threat to the Democratic Process*, in 25 *INTERNATIONAL ORGANIZATION* 706 (1971). Since then, scholars have devoted much attention to the issue. In addition to the literature already mentioned (*supra* note 30), see Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, in *TRANSATLANTIC REGULATORY CO-OPERATION. LEGAL PROBLEMS AND POLITICAL PROSPECTS* 521 (George A. Bermann, Matthias Herdegen, Peter L. Lindseth eds., 2000), and, for a recent critical appraisal, Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE JOURNAL OF INTERNATIONAL LAW* 113 (2009).

⁴⁹ Stewart, *The Reformation*, *supra* note 45.

⁵⁰ See Cassese, *supra* note 8, at 775, observing that “as there are no periodic elections at the global level, procedural accountability plays a dominant role in making global bodies responsible to global society.” See also Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 *NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY* 695, 717-722 (2005), and Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE LAW JOURNAL* 1490 (2006).

police information, warnings about criminal activities and imminent threats to public safety, location of stolen goods and missing persons, identification of dead bodies. The circulation is restricted to the competent national police units, for evident security reasons.⁵¹ Second, Interpol collects data concerning names of suspect criminals, fingerprints and DNA profiles, stolen and lost travel documents, stolen goods (vehicles and works of art). These data are placed in *ad hoc* operational databases, which are accessible only – and again understandably so – to national police forces. Remaining activities (operational support during crisis, training et cetera) are material in character and thus less relevant in this context. It can be added that Interpol is timidly developing some intelligence capacity, so far limited to the analysis of global crime trends and, more specifically, to the use of the internet by terrorists, to crimes against children and to intellectual property crimes. For practical reasons, all these functions do not leave relevant margins for public participation or disclosure. Most mechanisms of interest representation would be meaningless (notice-and-comment, for instance, would be misplaced) or even counterproductive (transparency would be damaging if understood as public disclosure of sensible data).⁵²

Due to the intrinsic opacity of most security activities, domestic agencies performing similar tasks are, in principle, tightly controlled by the government that, in turn, bears the political responsibility for their action before the parliament. “Transmission belt”, thus, is the prevailing (if not exclusive) model adopted in the field: reliance on

⁵¹ According to the Rules on the processing of information for the purposes of international police co-operation, national and international entities other than the National Central Bureaus may consult or provide information via Interpol’s channels only if they are expressly authorized to do so (Article 1 (f) and (g)), and essentially for international police co-operation purposes (Article 2). See also Chapter III (“Security and Confidentiality”) of the Implementing rules for the rules on the processing of information for the purposes of international police co-operation.

⁵² Interpol’s General Secretariat has, accordingly, the duty to “grant access to an item of information or to a database solely to those persons whose functions or duties are connected with the purpose for which the said information is processed”, to “protect the information it processes from any unauthorized or accidental form of processing such as alteration (modification, deletion or loss) or unauthorized access and use of that information”, and to “check and ensure that only those persons authorized to access the information had done so” (Article 23 of the Rules on the processing of information for the purposes of international police co-operation).

“top down” checks is the rule in the domestic setting.⁵³ By contrast, as we have seen, international police cooperation enjoys a high level of autonomy and at least partially escape such checks.

There is a rationale behind this tendency. Specialists argue that, by building relations with their foreign counterparts, domestic police agencies expand their knowledge of transnational crimes and successfully increase their autonomy from political oversight. Such a partial “detachment” from their respective governments, in turn, facilitate the “de-politicization” of international police cooperation, thereby expanding its reach. International police cooperation is, thus, crucially dependent on the ability of police agencies to gain a position of relative independence from governments.⁵⁴ And this reintroduces in the discourse the functional imperatives that we have already acknowledged.⁵⁵

As a result, a self-sustaining dynamic, based on the cardinal principles of members’ consent and political neutrality, buttresses Interpol’s action. Consent and neutrality, rather than delegation and participation, are the main sources of Interpol’s legitimacy. No sign, yet, of accountability, other than that provided by the consent of national administrative sub-units “on the loose”.⁵⁶

PART II. INTERPOL AND “SOFT” ADMINISTRATIVE POWERS

It is common view that the legitimacy stemming from state consent reaches its limits when an international (administrative) measure affects individual rights.⁵⁷ Are those limits reached in the case of Interpol?

⁵³ See the comparative studies in PATTERNS OF POLICING: A COMPARATIVE INTERNATIONAL ANALYSIS (David H. Bayley ed., 1990), and in Barry Loveday, *Government and Accountability of the Police*, in POLICING ACROSS THE WORLD: ISSUES FOR THE TWENTY-FIRST CENTURY 132 (Rob I. Mawby ed., 1999). See also, THE POLICE, PUBLIC ORDER AND THE STATE (John D. Brewer et al. eds., 1996), and COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM (James Beckman ed., 2007).

⁵⁴ For this view, Deflem, *supra* note 13; Mathieu Deflem, *Bureaucratisation and Social Control: Historical Foundations of International Policing*, 34 LAW AND SOCIETY REVIEW 601 (2000).

⁵⁵ *Supra*, section I.2.

⁵⁶ Slaughter, *supra*, note 48.

⁵⁷ E.g. August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOBAL GOVERNANCE 131 (2001); Dan Sarooshi, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS

Among the few scholars that have dealt with the question, the standard answer is negative. Interpol is not entrusted with any significant investigative or operational powers. Those powers are still located at national level. Interpol cannot adopt the typical police measures – arrest, for instance – that most directly impinge upon personal freedoms. Its core business is the administration of information. Thanks to its sophisticated communication network (the I 24/7 Communication System), Interpol is able to circulate crime-related information and notices worldwide in real time. Interpol, thus, seems to have “no transnational or international powers with regard to the individual.”⁵⁸

In this section, I contend that this conclusion is not accurate. My purpose is to show that the legal issues related to Interpol’s administrative powers go beyond the problems of privacy and data protection to which public law disciplines are more accustomed.⁵⁹ In particular, I will focus on the most publicly renowned – and yet scholarly neglected – instrument of Interpol, namely “red notices”.

The issuing of such notices “to seek the location and arrest of a person with a view to his/her extradition”⁶⁰ presupposes the establishment of *ad hoc* databases and, thus, also interferes with the individual right to privacy and informational self-determination.⁶¹ Not surprisingly, two sets of Interpol’s secondary rules – respectively, on the processing of police information⁶² and on the

(2005); Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INTERNATIONAL AFFAIRS 405 (2006).

⁵⁸ Bettina Schöndorf-Haubold, *The Administration of Information in International Administrative Law: The Example of Interpol*, 9 GERMAN LAW REVIEW 1719, 1742 (2008).

⁵⁹ For a thorough analysis, Schöndorf-Haubold, *supra* note 58, 1736-1739 and 1745-1747. See also Bart De Schutter, *Police Information Exchange and Privacy Protection. A European Perspective*, in STRATEGIES OF THE EU AND THE US IN COMBATING TRANSNATIONAL ORGANIZED CRIME 79 (Brice De Ruyver, Gert Vermeulen and Tom Vander Beken eds., 2002) (comparing Interpol’s rules of data protection to the Schengen and Europol ones). Specifically on data protection in the Schengen Information System, Stephen Kabera Karanja, TRANSPARENCY AND PROPORTIONALITY IN THE SCHENGEN INFORMATION SYSTEM AND BORDER CONTROL CO-OPERATION (2008).

⁶⁰ Article 37 (a) (1) (i) of Interpol’s Implementing rules for the rules on the processing of information for the purposes of international police co-operation.

⁶¹ See Schöndorf-Haubold, *supra* note 58, at 1741.

⁶² The rules on the processing of police information – all available at <http://www.interpol.int/Public/icpo/LegalMaterials/constitution/default.asp> – are divided in three sub-sets: a) the Rules on the processing of information for

control of personal data⁶³ – discipline the issuing of notifications within the context of data protection. Nonetheless, in this part my claim is *a)* that red notices raises problems of legal (and political) accountability that go beyond the privacy issue, and *b)* that such problems can *only* be captured *if* one is willing to abandon a positivist stance and to accept that “soft” international administrative acts enjoy legal significance.

II.1. Red notices: basic features

Red notices, or international wanted persons’ notices, concern persons that are wanted by national jurisdictions or by international organizations – such as international criminal tribunals – with which Interpol has special agreements. In 2009, the General Secretariat of Interpol issued 5,020 red notices.⁶⁴ These notices are characterized by three main features, concerning *i)* the nature, *ii)* the conditions and *iii)* the effects.

i) In order to detect the nature of a red notice, it seems appropriate to distinguish the arrest warrant from the notice itself, understood as the communication element of a complex administrative act. The source of the warrant is national: more specifically a domestic judicial authority. The source of the notice is, instead, Interpol: it is up to the Secretariat General, with the assistance of the competent National Central Bureau (functionally dependent from Interpol), to authorize the national request to publish the warrant on Interpol’s *ad hoc* database and to circulate it on Interpol’s communication system. Therefore, it is true – as other scholars state – that a red notice formally is not an international arrest warrant. Nonetheless, it is an international administrative act: namely, an act of authorization (to publish and circulate a national arrest warrant) issued by Interpol.⁶⁵

the purposes of international police co-operation (hereinafter, Processing Rules); b) the Implementing rules for the rules on the processing of information for the purposes of international police co-operation (hereinafter, Implementing Rules); c) the Rules governing access by an intergovernmental organization to the Interpol telecommunications network and databases.

⁶³ The control of personal data is disciplined by: a) the Rules on the control of information and access to Interpol’s files (hereinafter, Control Rules); b) the Rules on international police co-operation and on the internal control of Interpol’s archives.

⁶⁴ See Interpol, *Notices* (2010), Fact Sheet COM/FS/2010-01/GI-02, available at <http://www.interpol.int/Public/ICPO/FactSheets/GI02.pdf>.

⁶⁵ Article 10 (5) of Processing Rules makes it clear that the author of all the notices is the General Secretariat: “Notices shall be published by the General

ii) Interpol authorizes the publication and circulation of the act if three conditions are met: a) that the person sought is the subject of criminal proceedings or has been convicted of a crime; b) that sufficient information is provided to allow for the co-operation requested to be effective; c) that assurances have been given that extradition will be sought upon arrest of the person, in conformity with national laws and/or the applicable bilateral and multilateral treaties.⁶⁶ In practice, Interpol's Secretariat General deems the first two conditions fulfilled if the national arrest warrant, on one hand, contains sufficient information related to the identity of the suspect criminal (physical description, photograph, fingerprints, occupation, languages spoken, identity document numbers) and if, on the other, it provides references to "an enforceable arrest warrant, court decision or other judicial documents",⁶⁷ together with indication of the nature of the charge and the maximum penalty applicable. While the first condition responds to functional needs (identity details are necessary to facilitate local police searches), the second condition pertains to the sphere of legal guarantees: the judicial source of the warrant stands as presumption that the national request complies with the rule of law and that it is not a discretionary act of the executive.

In the latter respect, the main problem of legal accountability concerns the newly created "Interpol-UN Security Special Notice".⁶⁸ In general, red notices are based either on an arrest warrant (issued for a person wanted for prosecution) or on a court decision (for a person wanted to serve a sentence): either way judicial involvement is there.

Secretariat either at its own initiative or at the request of a National Central Bureau, authorized national institution or authorized international entity".

⁶⁶ The three conditions are listed in Article 37 (1) (a) (ii) of Implementing Rules. See also Article 38 (b): "The General Secretariat may only publish a notice once it has verified that the processing required conforms to the rules in force and once the National Central Bureau, authorized national institution or authorized international entity which requested its publication, has communicated to it all the required sets of information."

⁶⁷ Article 37 (1) (a) (ii) of Implementing Rules.

⁶⁸ This type of notice – created in 2005, in response to UN Security Council Resolution 1617 – specifically concerns individuals and entities that are the targets of UN sanctions against Al Qaeda and the Taliban. The aim is to support the implementation of the UN 1267 Committee decisions regarding the freezing of assets of suspect terrorists. In 2009, Interpol issues 17 Interpol-UN notices.

By contrast the issuing of an “Interpol-UN Security Special Notice” does not presuppose any judicial involvement. The legitimacy effect stemming from Interpol’s implicit approval is particularly problematic, insofar as it grants worldwide spread to a very restrictive international administrative decision that has been adopted according to a diplomatic procedure, outside any judicial control and, more generally, outside the reach of the rule of law.⁶⁹

iii) As for the legal effects, if assurance has to be given “that extradition will be sought upon arrest of the person” (see the above-mentioned third condition for the issuance of red notices), it is evident that a red notice does not amount to a request of extradition.⁷⁰ The same provision makes also clear, though, that a relation between the notice and the request of extradition do exist: once encapsulated in a notice, the national arrest warrant explicitly becomes instrumental to extradition. In fact, Interpol internal rules construe a red notice as the final act of a pre-extradition procedure: it corresponds to a request of provisional arrest with a view to extradition, an act that is usually disciplined in bilateral and multilateral treaties on extradition.⁷¹

⁶⁹ In support of this conclusion, it is enough to mention the final act of the *Kadi saga*: European Court of Justice, *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council & Commission*, Joined Cases C-402/05 P & C-415/05 P, 3 September 2008 (holding that a European regulation implementing a UN decision that freezes the assets of a suspect terrorist violates the rights of defense and the right to an effective judicial remedy of the concerned person).

⁷⁰ According to the common understanding, “Extradition is the process by which States seek the returns of fugitives, that is the surrender of persons either accused or convicted of crimes, to the States where those crimes were allegedly committed”: Arvinder Sambei and John R.W.D. Jones, *EXTRADITION LAW HANDBOOK* 1 (2005). On the principle of territorial jurisdiction, upon which the regime of extradition is built, see Antonio Cassese and Mireille Delmas-Marty, *JURISDICTIONS NATIONALES ET CRIMES INTERNATIONAUX* (2002).

⁷¹ Christopher H. Pyle, *EXTRADITION, POLITICS, AND HUMAN RIGHTS* (2001) observes that the “provisional arrest” (i.e. arrest before documents establishing probable cause can be supplied), as enshrined in various international agreements, is a practices that “dates from the age of the sail, when it took weeks or months for slow-moving mails and slow-traveling witnesses to catch up with telegraphed detention requests”, and yet “it remains common practice in the age of fax machines and high-speed air travel.” The consequence is that, for instance, in the United States, if the foreign policy interest is deemed to be strong, the Fourth Amendment to the Constitution does not fully apply: the relevant judge, in fact, does not perform the usual scrutiny of allegations and supporting evidence before the person is subject to a planned arrest (*Ibidem*, at

Moreover, it is true that red notices are not legally binding and that, accordingly, domestic authorities are free not to honor them. For this reason, scholars assert that red notices “cannot be considered as administrative decisions on individual cases with transnational effect in the sense of an ‘international administrative act’.”⁷² Yet, it is also true that, as Interpol itself recognizes, “many of Interpol’s member countries, however, consider a Red Notice a valid request for provisional arrest.”⁷³ While the non-binding nature of the notice would allow the recipient country to disregard it, the practice – with few exceptions (the U.S. being the most prominent one) – is the opposite: many member states tend to honor the notice. If they can, they apprehend the fugitives appearing on Interpol’s web page and proceed to arrest. When that is the case, the notice itself results in a threat to personal liberty, as the case below shows.

II.2. The Kazakh Case (I): the impact on personal freedom

In early summer 1999, Interpol issued a red notice for the arrest of Mr. Kazhegeldin, by then former prime minister of Kazakhstan and leading opposition figure of the repressive Nazarbayev regime. The request against Mr. Kazhegeldin had been advanced by the Kazakh National Bureau on the basis of allegations of tax evasion, money laundering, abuse of office and illegal ownership of property outside the country (in Belgium). As a consequence, while travelling to Russia for a meeting of the Republican Peoples Party of Kazakhstan, the opposition political party, Mr. Kazhegeldin was arrested by the Russian police and detained on the basis of a red notice issued by Interpol on Kazakh request. Yet, the general prosecutor of Kazakhstan was unable to substantiate the charges. Thus, the

308). More accurately, under 18 U.S.C. sec. 3184, to get a person arrested in the United States, the foreign country is (only) requested to provide “a sworn complaint declaring that the accused is wanted for an extraditable offence, a statement that an arrest warrant exists, a few facts, a physical description of the accused, and a promise to make a fully documented, formal request later. This is sufficient to put the accused behind bars for between thirty days and three months, depending on the treaty, while the paperwork is being processed. Prehearing incarcerations of seven to eight months are not uncommon.” (*Ibidem*, at 415, note 74).

⁷² Schöndorf-Haubold, *supra* note 58, at 1740.

⁷³ Interpol press release, *INTERPOL General Assembly upholds Executive Committee decision on AMIA Red Notice dispute* (November 7, 2007).

Russian general prosecutor ordered the release after concluding that the allegations were unfounded.

Two points need to be noticed: first, the Interpol-sponsored warrant was subject to judicial review in the recipient state; second, this “life net” scrutiny is important, but not sufficient to insure the integrity of individual rights. Given the *ex post* nature of this safeguard, in fact, Mr. Kazhegeldin “was prevented from meeting with his political supporters and from exercising rights guaranteed to him under the United Nations Universal Declaration on Human Rights.”⁷⁴

However, few months later, in July 2000, while travelling to Rome, Kazhegeldin was arrested and detained by Italian authorities, again on the basis of an Interpol red notice issued at the request of the Kazakh National Bureau. In addition to the previously rejected charges, new allegations of terrorism-related crimes had been advanced against him. Once again, the Kazakh general prosecutor did not provide sufficient evidence and the Italian authorities released Mr. Kazhegeldin, having found that the charges were groundless.

One may wonder whether the Russian and Italian authorities would have enforced the Kazakh warrant, had it not been encapsulated in a red notice. Absent such a captivating international wrapping, would have Mr. Kazhegeldin enjoyed a double stay in the Russian and Italian jails? Unlikely so.

As the Kazakh case shows, Interpol’s decision to publish and circulate a national arrest warrant may bear severe consequence for the personal freedom of wanted persons. Interpol’s parties tend to honor foreign warrants (that – absent an extradition treaty – they would otherwise disregard) because red notices are widely perceived as internationally-sanctioned measures, deserving, as such, deference and prompt implementation.⁷⁵

⁷⁴ Charles R. Both, *International Police Force or Tool For Harassment of Human Rights Defenders and Political Adversaries: Interpol’s Rift with the Human Rights Community*, 8 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 357, 359 (2001-2002) (detailed description of the case provided by Mr. Kazhegeldin’s lawyer). See also Human Rights Watch, HUMAN RIGHTS WORLD REPORT 2001 471-473 (2001); Ron Stodghill, *Oil, Cash and Corruption*, NEW YORK TIMES (November 5, 2006).

⁷⁵ On the existence of an international rule of law, Matthias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 19

For this reason, many countries have declared themselves *a priori* committed to consider red notices as valid warrants, thus granting them a sort of “direct effect” in their land even when the foreign request is not based on a previous agreement. This “direct effect” and the resulting procedural simplification, however, do not imply any “supremacy” granted to the foreign warrant over domestic law. Red notices, in fact, are different from European arrest warrants.⁷⁶

The 2002 European arrest warrant framework decision contains a list of 32 categories of offences (the most important and troubling being “terrorism”) that give rise to surrender “without verification of the double criminality of the act”.⁷⁷ Red notices, by contrast, do not trump the principle of double criminality.⁷⁸ Extradition is always

(2003). On the dangers stemming from the assumption that international norms and decisions are always “good” and thus deserve prompt implementation, Kim L. Scheppele, *The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 373 (Sujit Choudhry ed., 2007) (observing that, «it is not just constitutional ideas that migrate, but it may well be anti-constitutional ideas as well»).

⁷⁶ On the birth of the European arrest warrant, Steve Peers, *Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?*, 41 *COMMON MARKET LAW REVIEW* 5 (2004); Susie Alegre and Marisa Leaf, *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—The European Arrest Warrant*, 10 *EUROPEAN LAW JOURNAL* 200 (2004). See also, on the constitutional implications, Nico Keijzer, *The European Arrest Warrant Framework Decision between Past and Future*, in *CONSTITUTIONAL CHALLENGES TO THE EUROPEAN ARREST WARRANT* 15 (Elspeth Guild ed., 2006); Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, 43 *COMMON MARKET LAW REVIEW* 1277 (2006). For an illustration of the previous regime, Mark Mackareel and Susan Nash, *Extradition and the European Union*, 46 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 948 (1997).

⁷⁷ For any other criminal offence, the principle of dual criminality continues to apply: Article 2(2) and (4) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter, “EAW Framework Decision”). See Nico Keijzer, *The Double Criminality Requirement*, in *HANDBOOK OF THE EUROPEAN ARREST WARRANT* 137 (Rob Blekxtoon, Wouter van Ballegooij eds., 2005), and, for an assessment of how the (partial) abolition of the dual criminality verification works in practice, Elies van Sliedregt, *The Dual Criminality Requirement*, in *THE EUROPEAN ARREST WARRANT IN PRACTICE* 51 (Nico Keijzer, Elies van Sliedregt eds., 2009). See also, more generally,

⁷⁸ On this consolidated principle of extradition law, Christine van den Wyngaert, *Double Criminality as a Requirement to Extradition*, and Michael Plachta, *The*

subject to the condition that the acts for which the arrest warrant has been issued constitute an offence under the law of the requested state. If that condition is not fulfilled, national authorities are free not to honor an Interpol-sponsored arrest request. Red notices, thus, bear no constraint on national sovereignty. In addition, extradition can be refused on human rights grounds like the political offence exception,⁷⁹ while the European Arrest Warrant severely limits the possibility to refuse the surrender on human rights grounds⁸⁰ and abolishes the political offence exception.⁸¹ However, the binding nature of European arrest warrants finds compensation in a detailed

Role of Double Criminality in International Cooperation in Penal Matters, both in DOUBLE CRIMINALITY. STUDIES IN INTERNATIONAL CRIMINAL LAW 43, 84 (Nils Jareborg ed., 1989).

⁷⁹ In any event, the exception has a limited reach: it only protects participants in uprising (see Pyle, *supra* note 71, at 313, noting that “proponents of political offence exception often overstate its effectiveness in averting foreign injustice”), while in most cases opponents of national regimes are protected by the principle of *non-refoulement*. This principle of refugee law forbids the expulsion of a refugee (*rectius*, of any person) into a country where the person might be subjected to persecution.

⁸⁰ Article 1(3) of the EAW Framework Decision explicitly acknowledges the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union. However, in their implementing laws, ten member states have retained the power to oppose human rights exceptions. On the implementation of the European arrest warrant, see Massimo Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*, 15 EUROPEAN LAW JOURNAL 70, 81 (2009); Sebastian Combeaud, *Implementation of the European Arrest Warrant and the constitutional impact in the member states*, in Guild, *supra* note 76, at 190; Mark Mackarel, *The European Arrest Warrant—the Early Years: Implementing and Using the Warrant*, 15 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 37 (2007); Mar Jimeno-Bulnes, *The Enforcement of the European Arrest Warrant: A Comparison Between Spain and the UK*, 15 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 263 (2007).

⁸¹ The 1996 EU Convention on extradition between member states (Council act of 27 September 1996, 96/C 313/02) already made this ground of exception non-opposable within the realm of terrorism. The EAW Framework Decision goes beyond terrorism, making the abolition absolute. The only *mandatory* grounds for refusal, acknowledged by Article 3 of the Framework Decision are amnesty, *ne bis in idem* and the age of the suspect. Article 4 mentions other *optional* grounds for refusal, none of which refers the political offence exception. Yet, in some member states (Italy, Denmark and Portugal), some form of political offence exception has been reintroduced.

set of procedural guarantees⁸² and in the “judicialisation” – i.e. “de-administrativisation” – of the extradition process.⁸³

Despite these relevant differences, the Kazakh case makes clear that a “soft” Interpol red notice may affect personal freedom in a way that is very similar to the impact of a “hard” European arrest warrant,⁸⁴ without being accompanied by a comparable set of guarantees.⁸⁵ Though formally non-binding, red notices bestow a “superior legitimacy” on foreign arrest warrants that would be otherwise disregarded. As a result, the issuing of a red notice had a crucial impact on the personal liberty of Mr. Kazhegeldin. To his freedom, a red notice was *de facto* equivalent to a binding arrest warrant. This statement needs, now, to be qualified in legal terms, in

⁸² See especially Articles 14, 15, 17 and 23 of Council Framework Decision 2002/584/JHA.

⁸³ See Michael Plachta, *European Arrest Warrant: Revolution in Extradition?*, 11 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 178, 184 (2003): “Arguably the most striking feature of the extradition system based on the Framework decision is its removal outside the realm of the executive. The sole responsibility for this procedure has been placed in the hands of the judiciary (...) Since the procedure for executing the European arrest warrant is primarily judicial the political phase inherent in the extradition procedure is abolished. Accordingly, the administrative redress phase following the political decision is also abolished.”

⁸⁴ It is worth noting that, according to the EAW Framework Decision, *a*) the domestic authority issuing a European arrest warrant may “decide to issue an alert for the requested person in the Schengen Information System (SIS)” (or, “if it is not possible to call on the services of the SIS, the issuing judicial authority may call on Interpol to transmit a European arrest warrant”); *b*) “An alert in the Schengen Information System shall be equivalent to a European arrest warrant” (Articles 9(2-3) and 10(3)). Two points need to be emphasized. Firstly, the EU decision treats SIS and Interpol global communication network as functionally equivalent, neglecting their different potential (see Ronald K. Noble, *11th Annual European Police Congress*, Keynote Speech by Interpol Secretary General, 29-30 January 2008, insisting that “it is crucial to use INTERPOL channels to inform law enforcement worldwide about wanted fugitives. All too often, when a European Arrest Warrant is issued, it is not circulated to non-European countries”). Secondly, and more importantly, the EU decision explicitly qualifies the arrest warrant and its notice (or alert) as legally “equivalent”, thereby preventing the rise of a gap between form and substance. As observed, Interpol regime adopts the opposite solution, because it clearly distinguishes the arrest warrant from the notice and treats the latter as a mere communication element of a complex administrative act (*supra*, Section II.1).

⁸⁵ On the (low) level of legal protection that accompanies the issuing of red notices, see *infra*, Part III.

order to substantiate the claim that a red notice, despite its “softness”, deserves consideration as an international administrative act.

II.3. Red notices as “soft” international administrative acts

One way to drive the point home is to ask why most Interpol members tend to honor red notices *as if* they were binding. One reason is illustrated by the third above-mentioned condition for the issuing of notices. That condition requires national authorities to draft their arrest warrants “in conformity with national laws and/or *the applicable bilateral and multilateral treaties*”, if they want it to be circulated by Interpol. The implication of this conformity requirement deserves particular attention. If Italy receives a red notice encapsulating a warrant from the U.S. and the warrant complies – as it should, according to Interpol’s condition – with the requirements enshrined in a pre-existing Italy-U.S. bilateral treaty,⁸⁶ then it is hardly possible for the Italian authorities to claim that they can *legally* disregard the notice. In short, if a red notice is consistent with (and thus “covered” by) an extradition treaty, it amounts to an act with legal force. This case of “regime complex”⁸⁷ – in which informal Interpol rules overlap with formal bilateral or multilateral treaties – determines the “hardening” of a “soft” administrative instrument: red notices circulate globally borrowing their (legal) teeth from pre-existing treaties.

What, then, if there is no underlying international treaty? Here a second dynamic emerges. Even in the absence of an extradition treaty, domestic law usually provides a basis to extradite fugitives. As observed, “[t]he requirements for extradition pursuant to a domestic law often mirror the requirements set forth in a bilateral or multilateral treaty and the domestic process under the law to effect

⁸⁶ See United States of America and Italy Extradition Treaty, signed at Rome on 13 October 1983 (available at http://untreaty.un.org/unts/60001_120000/26/25/00051223.pdf).

⁸⁷ Kal Raustiala and David G. Victor, *The regime complex for plant genetic resources*, 58 INTERNATIONAL ORGANIZATION 277, 279 (2004), “Regime complexes are marked by the existence of several legal agreements that are created and maintained in distinct *fora* with participation of different set of actors. The rules in these elemental regimes functionally overlap, yet there is no agreed upon hierarchy for resolving conflict between rules.”

the fugitive's return is practically identical.”⁸⁸ If that is true, a silent process of cross-fertilization and harmonization seems at work in the field of extradition law: the conditions under which national authorities process the requests of extraditions (and pre-extradition arrest) appear to gradually converge towards a common set of standards, whose protective capacity tends to weaken in comparison to the domestic law guarantees surrounding personal freedom.⁸⁹

Against this backdrop, if we recall once again the third condition for the issuing of notices – the one that requires the conformity of arrest warrants “*with national laws and/or the applicable bilateral and multilateral treaties*” – we come to realize that national warrants complying with the conditions for issuing a red notice *ipso facto* also satisfy, more often than not, the relevant international and/or domestic legal requirements.

Let us imagine that Italian authorities receive a red notice encapsulating an arrest warrant from a country having signed no treaty on extradition with Italy. And let us assume that, nonetheless, the foreign request is consistent with the relevant Italian law (e.g. the request stands the main grounds of refusal: the “double criminality” test,⁹⁰ the “political crime” and human rights exception,⁹¹ and so on).⁹² In such a case, shouldn't the Italian authorities be bound by the

⁸⁸ David P. Warner, *Challenges to International Law Enforcement Cooperation for the United States in the Middle East and North Africa: Extradition and Its Alternatives*, 50 VILLANOVA LAW REVIEW 479, 488 (2005).

⁸⁹ See Pyle, *supra* note 71, at 301-306, arguing that various (fallacious) assumptions account for this lower level of protection, namely *a*) the idea that extradition does not affect “us” but “them” (80-90 percent of the extradition cases concerns aliens, i.e. non-citizens of the extraditing country), *b*) the assumption that extradition magistrates do not exert a proper “judicial power” in certifying the extradition, and *c*) somewhere – as in the United States – the idea that extradition is not a criminal proceeding, but rather a civil or an administrative one. E.g. *United States v. Galanis*, 429 F.Supp.1215, 1224 (D.Conn. 1977) and *Romeo v. Roche*, 820 F. 2d 540, 534-44 (1st Cir. 1987) (both the courts refusing to apply criminal law safeguards to extradition proceedings because they are not technically part of a criminal prosecution). This view is shared in the comment of the Advisory Committee on Rule 1101 of the Federal Rules of Evidence: “Extradition and rendition proceedings are (...) essentially administrative in character.”

⁹⁰ Article 13(2) of the Italian Criminal Code.

⁹¹ Article 698 of the Italian Criminal Procedure Code.

⁹² Moreover, the documentation required by Article 700(2) of the Italian Criminal Procedure Code to support a foreign arrest warrant – statement of the alleged criminal conduct and its circumstances, the kind and amount of the

Interpol-sponsored warrant exactly in the same way as if it were a formal international arrest warrant? Of course, even in that case, a state could disregard the red notice. Yet, the same holds true with almost any “formal” international measure, binding in theory, much less so in practice.⁹³ In both the cases, in fact, national authorities that do not comply violate either the underlying international treaty or their own domestic law (or even both). Under such conditions, the difference between a binding arrest warrant and a non-binding one vanishes.⁹⁴

Accordingly, an Interpol red notice can be conceptualized as a “parasitic” administrative act: just like parasites feed on other “organisms”, being unable to live on its own, so do red notices, which draw their binding force from other legal texts. However, reliance on other regimes (in our case, international and/or national extradition regimes) does not imply a lack of autonomous legal salience. It rather highlights the underlying “existential” dynamic, i.e. the legal rationale behind the practice of most Interpol’s members: they commit themselves to honor red notices because, by experience, they learn that Interpol-sponsored warrants are consistent with domestic and international law and are, therefore, legally equivalent to proper international arrest warrants. As

corresponding penalty, identity and factual details in order to facilitate the search and apprehension – largely corresponds to the documentation required for publishing a red notice (Article 37 (1) of Interpol Implementing Rules).

⁹³ On the question “why states obey international law”, Thomas M. Franck, *Legitimacy in the International System*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 705 (1988); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INTERNATIONAL ORGANIZATION 379 (1999). See also, on domestic compliance with international law, Abraham Chayes and Antonia Handler Chayes, *On Compliance*, 47 INTERNATIONAL ORGANIZATION 172 (1993); Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE LAW JOURNAL 2599 (1997); Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 49 WORLD POLITICS 482 (2000); Kal Raustiala and Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in *Handbook of International Relations* 538 (Walter Carlsnaes, Thomas Risse and Beth A. Simmons eds., 2002).

⁹⁴ On soft law as a global governance tool, see Kenneth A. Abbott and Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INTERNATIONAL ORGANIZATION 421(2000); *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Ulrike Morth ed., 2005); *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance* (John J. Kirton and Michael J. Trebilcock eds., 2004).

observed, “regulatory cooperation, both hard and soft, amounts to administration by agreement in a way just as substantial as agreement by treaty. It is, accordingly, somewhat unhelpful to focus on the legal quality of the international agreement when it enjoys widespread compliance.”⁹⁵

It seems, thus, not hazardous to conclude: a) that red notices are “soft” international administrative acts; b) that their “softness”, consequent to their *formally* non-binding nature, does not prevent them from impinging upon individual freedoms, due to their *substantial* binding nature (widespread recognition); c) that this substantive “hardening” is the effect of a triangular process of “borrowing regimes”, with both international treaties and domestic laws on extradition lending their legal force to Interpol notices; d) that this mutually-reinforcing process is allowed by a process of spontaneous convergence that levels the requirements for extradition in international and domestic law, eventually generating an informal phenomenon of “mutual recognition”; e) that Interpol “softly” but decisively contributes to such a process of convergence: thanks to its crucial role as global circulator of national warrants, its internal conditions for the issuing of notices result in the setting of a global standard.

PART III. RED NOTICES AND LEGAL ACCOUNTABILITY

Interpol red notices are a manifestation of an administrative power that is both “soft”, because it is formally non-binding, and “authoritative”, in so far as it has the potential to limit personal liberty.⁹⁶ Is there any reason to worry? Do we really need the rule of

⁹⁵ David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHICAGO INTERNATIONAL LAW JOURNAL 547, 598 (2005).

⁹⁶ The classic notion of “authoritative” administrative act goes back to Otto Mayer, DEUTSCHES VERWALTUNGSRECHT 95 (Vol. I, 1895), who famously depicted an administrative measure as an “authoritative pronouncement of the administration which in an individual case determines the rights of the subject”. On the German roots of this conceptual framework, later on adopted by most legal cultures in Continental Europe, Mahendra P. Singh, *German Administrative Law in Common Law Perspective* 63 (2001). See also, Luca Mannori and Bernardo Sordi, STORIA DEL DIRITTO AMMINISTRATIVO 369 (2001), providing an illuminating comparative analysis of the historical evolution of administrative law.

law be established at Interpol level to keep in check an administrative power that is merely “soft”?⁹⁷

A first attempt to deny such a need can be based on the following warning: not to forget that the main site for the protection of individual rights is still domestic, because national courts provide all the concerned persons with the necessary due process guarantees.⁹⁸ “Bottom up” review of international regulatory power by domestic courts is a crucial accountability tool in a global administrative law perspective.⁹⁹

This holds true also in the case of red notices. Even if Interpol mistakenly authorizes the circulation of a biased warrant, there is always, in the country where the wanted person is apprehended, another judicial authority that assesses the consistency of the allegations and prevents the extradition if charges are ill-founded. Finally, in the country of extradition, the arrested enjoys (at least, in principle) full rights of defense before a court. In short, a red notice may lead to deprivation of personal freedom, but nonetheless does not raise a doubt *vis-à-vis* the person’s innocence, which remains a question for the competent judicial authorities to determine. Isn’t this judicial double-check, typical of extradition procedure, enough?

Before answering, a clarification is in order. If – as argued above – red notices are autonomous administrative measures bearing their own distinctive legal effect,¹⁰⁰ then one should distinguish between the general guarantees surrounding the procedure of extradition and the specific guarantees accompanying the publication of Interpol red notices: the focus, here, is on the latter power-checking issue.

The promotion of worldwide police cooperation yields a troublesome externality: Interpol’s door is open to all the countries of the world, including countries where fundamental rights are disregarded or where prosecutors and courts are not independent. Therefore, to declare in advance – as many states do – that Interpol red notices are to be honored is risky: the danger is there that, by

⁹⁷ For a negative answer, justified in a strictly positivist perspective, see Jean d’Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 9 EJIL 1075 (2008). The issue is extensively discussed *infra*, in the Conclusion.

⁹⁸ This position is common to scholars that deny the autonomous relevance of red notices as (international) administrative acts. See Schöndorf-Haubold, *supra* note 58, at 1942.

⁹⁹ Stewart, *U.S. Administrative Law*, *supra* note 45, at 76-88.

¹⁰⁰ See *supra*, Section II.3.

taking Interpol red notices seriously, police forces of a liberal state may unexpectedly become the executive arm of an illiberal government. In sum, in red notices system, a crucial element of extradition procedures is absent, and that is *trust*.¹⁰¹

This is why *ad hoc* bilateral or multilateral agreements are the privileged source of legal commitment in this matter. By signing treaties, liberal governments select counterparts they can rely upon, (also) having regard to their rule of law “pedigree”.¹⁰² By contrast, Interpol-sponsored cooperation follows a different logic: governments choose to commit themselves to international cooperation and, hence, to trust Interpol rather than the other members. State-by-state commitment, usually enshrined in bilateral treaties, is mediated (and substituted) by acknowledging Interpol as guarantor of fair international cooperation.

Assessed in this perspective, the previous question (“Aren’t the typical extradition law guarantees enough?”) deserves a negative answer. Interpol red notices are autonomous administrative acts, conceptually distinct from the underlying national arrest warrant: hence, something more than the usual extradition guarantees is required. The relevant question, thus, becomes the following: whether Interpol has put in place the legal infrastructure necessary to act as “reliable guarantor”, or – more accurately – whether the processing of red notices has built-in due process guarantees that are sufficient to prevent the international circulation of ill-founded national arrest warrants.¹⁰³

¹⁰¹ The issue of trust has been extensively debated in the European Union with regard to the alternative between harmonization and mutual recognition. See Cardiff European Council, PRESIDENCY CONCLUSIONS (SN 150/1/98 REV 1, 15 and 16 June 1998). See also, Hans Nilsson, *Mutual Trust and Mutual Recognition of Our Differences*, in LA RECONNAISSANCE MUTUELLE DES DÉCISIONS JUDICIAIRES PÉNALES DANS L’UNION EUROPÉENNE 155 (G. De Kerchove and A. Weyembergh eds., 2001); after the introduction of the European arrest warrant, Florian Geyer, *The European Arrest Warrant in Germany: constitutional mistrust towards the concept of mutual trust*, in Guild, *supra* note 76, at 115.

¹⁰² See, for instance, Isidoro Zanotti, *EXTRADITION IN MULTILATERAL TREATIES AND CONVENTIONS* (2006) (analysing extradition agreements among American countries).

¹⁰³ It would be ingenuous – one might nonetheless contend – to expect that an international institution, whose aim is to promote police cooperation, should also correct domestic “failures” (e.g. disregard for the rule of law) occurring in non-democratic countries. Reasonable as it may seem, this objection misses the

To put it differently, a citizen may accept to be arrested and temporarily detained on the basis of ill-found charge if the warrant is issued in conformity with the rules and procedures of *her own* domestic legal order: after all, those rules and procedures have been defined by political representatives that she has contributed to elect and that are accountable to her. An altogether different issue is for that citizen to accept the same restrictions to personal freedom when they are imposed by a warrant of a foreign authority, especially if the issuing state does not respect the basic principles of democracy and rule of law. Can democratic states be content with a global governance system that allows such a practice – and indeed strengthens it – without providing for adequate guarantees? Is it acceptable that an international regime allows domestic authorities to pursue legally questionable practices or, worse, to infringe upon “the most fundamental of all rights recognised in the European Convention and the US Constitution”¹⁰⁴ without establishing specific counter-measures? By accepting this accountability gap in the case of Interpol, liberal democracies would undermine their commitment to the rule of law in the name of effective police cooperation. The governance *ethos* – “what counts is to apprehend fugitives and, even if sometimes we arrest and detain them for wrong reasons, *pace!*” – would prevail and a further silent shift in the balance between security and freedom would occur.¹⁰⁵

point. The correction invoked here does not pertain to a national measure (arrest warrant). It rather pertains to the legal accountability of an international regime (Interpol) and its administrative acts (red notices). If is not possible to prevent the issuing of biased arrest warrants at domestic level, it is still possible, and perhaps necessary, not to grant those warrants any international approval, that is, any substantive extra-territorial force. In any case, multilateral institutions can also contribute to enhancing democracy at national level in many ways, also by protecting individual rights and improving the quality of democratic: see Robert O. Keohane, Stephen Macedo and Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INTERNATIONAL ORGANIZATION 1 (2009).

¹⁰⁴ This is how Sottiaux, *supra* note 36, at 197 refers to personal liberty. See European Court of Human Rights, *De Wilde, Ooms and Versyp v Belgium*, Series A no 12, para 65 (1971) (qualifying freedom from arbitrary arrest as a cornerstone of democratic society).

¹⁰⁵ The “security v. liberty” debate has been revived by western governments’ use of emergency powers in the fight against international terrorism after September 11, 2001. See, among the most relevant contributions with a prevalent American focus, Bruce Ackerman, *BEFORE THE NEXT ATTACK: PRESERVING LIBERTIES IN AN AGE OF TERRORISM* (2006); Oren Gross and

In Part III, it is argued that such a shift is unnecessary. Interpol red notices system allows some room for solutions (already partially introduced) that permit to enhance legal accountability without harming the effectiveness of international cooperation. In a global administrative law perspective, functional and normative needs of international police cooperation can be reconciled, at least to considerable extent. In Section III.3, I try to substantiate this claim, after a critical analysis – carried out in Sections III.1-III.2 – of the guarantees provided for in Interpol’s processing of red notices.

III.1. The Kazakh case (II): the administrative control

As the previous discussion of the Kazakh case makes clear,¹⁰⁶ judicial control offered by the countries where the arrest takes place may be effective in preventing extradition, but not an unjust (albeit temporary) detention. Albeit Russian and Italian magistrates did their job pretty well, in fact, Mr. Kazhegeldin had to suffer a patent violation of his right to personal liberty and spend some days in jail. And not just once, but twice.

However, the Kazakh case does not end with the second detention of Mr. Kazhegeldin in July 2000. One year later, Mr. Kazhegeldin is sentenced “in absentia” by the Supreme Court of Kazakhstan to ten years in prison for crimes involving the use of weapons. At the request of the Kazakhstan National Central Bureau, Interpol’ Secretariat General issues a new red notice (the third!) against Mr. Kazhegeldin, on the basis of the Supreme Court ruling. However, the Secretariat General itself subsequently ascertains that (once again)

Fionnuala Ní Aoláin, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006); David Dyzenhaus, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006); Eric A. Posner and Adrian Vermeule, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); Daniel Moekli, *HUMAN RIGHTS AND NON-DISCRIMINATION IN THE ‘WAR ON TERROR’* (2008). As for the national and regional initiatives on the opposite side of the Atlantic, see Jan Wouters and Frederik Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU’s Main Criminal Law Measures Against Terrorism After 11 September*, 41 *COMMON MARKET LAW REVIEW* 909 (2004); Mar Jimeno-Bulnes, *After September 11th: The Fight Against Terrorism in National and European Law Substantive and Procedural Rules: Some Examples*, 10 *EUROPEAN LAW JOURNAL* 235 (2004); *SECURITY VERSUS JUSTICE? POLICE AND JUDICIAL COOPERATION IN THE EUROPEAN UNION* (Elspeth Guild and Florian Geyer eds., 2008).

¹⁰⁶ *Supra*, Section II.2.

the evidence submitted does not support the charges. Therefore, Interpol decides to revoke the notice on the basis of Article 3 of its Constitution, which prohibits any intervention or activities of a political, military, religious or racial character. The Executive Committee unanimously upholds the decision, but the General Assembly – whose decision is final – eventually overturns it: on the insistence of the Kazakhstan National Central Bureau, the General Assembly re-examines the decision on 24 October 2002 and reinstates the red notice by a 46-38 majority (with 23 abstentions).¹⁰⁷

While the initial events of the Kazakh case (discussed in Part II) taught us what happens when Interpol does not carefully check a domestic request of red notice, the subsequent events illustrate the opposite situation, namely what happens (or may happen) when Interpol subjects a national request to a review process. Two aspects deserve a closer analysis: the role of the Secretariat General in reviewing the Kazakh request and the role of the General Assembly in settling the dispute. The former aspect is dealt with in the following pages, whereas the latter is analyzed in the next section (Part III.2).

III.1.1. Ex ante scrutiny

When a state submits a request to publish a red notice, the General Secretariat takes a (first instance) decision on the basis of an *ex ante* scrutiny of the request.¹⁰⁸ The general aim of this preventive control is to ensure that requests of red notice comply with Interpol's Constitution and its basic rules. This compliance is assessed having regard to three main obligations: to respect “the basic rights of individuals in conformity with (...) the Universal Declaration of Human Rights” (*rule of law requirement*);¹⁰⁹ to avoid “any intervention (...) of a political, military, religious or racial character”

¹⁰⁷ Interpol press release, *Interpol re-issue of red notice on former Kazakhstan PM* (October 24, 2002).

¹⁰⁸ It should be noted that the General Secretariat's control, described here as an *ex ante* mechanism, may well be carried out *ex post*, after the publication of a red notice, when a state so requests or when new relevant facts emerge. When this happens, the same requirements and condition as in the *ex ante* scrutiny apply. Thus, the General Secretariat, after having reviewed the grounds of the national arrest warrant on which a red notice is based, can cancel it, as happened in the mentioned Kazakh case.

¹⁰⁹ Article 2 of Interpol Constitution.

(*neutrality requirement*);¹¹⁰ to verify that domestic authorities process information through the Interpol's channels in conformity with the international conventions to which they are a party, as well as "in the context of the laws existing" in their countries (*legality requirement*).¹¹¹

In order to control the respect of these requirements, the General Secretariat is entrusted with three instruments. Firstly, it has no autonomous power of investigation, but it can ask the requesting country to clarify doubts either of formal or of substantive nature.¹¹² Secondly, it can adopt precautionary measures that may indirectly caution the members about the content of a red notice.¹¹³ An example is the publication of an addendum to a red notice, indicating that the extradition of the fugitive has been denied by another country.¹¹⁴ Finally, and most importantly, the General Secretariat may reject a request to issue a red notice, when the publication would conflict with the mentioned requirements.¹¹⁵

Having clarified the aims and the tools available to the General Secretariat to carry out an *ex ante* scrutiny of national requests for

¹¹⁰ Article 3 of Interpol Constitution.

¹¹¹ Article 10 (1) (a) (5) of the Processing Rules.

¹¹² The General Secretariat can consult the requesting national central bureau "if there is any doubt about whether the criteria for processing an item of information are being met" (Article 10 (1) (c) of the Processing Rules).

¹¹³ Precautionary measures can be adopted "to prevent any direct or indirect prejudice the information may cause to the member countries, the Organization or its staff, and with due respect for the basic rights of individuals the information concerns" (Article 10 (1) (d) of the Processing Rules).

¹¹⁴ A similar addendum is presumptively attached to the red notice still pending on Mr. Kazhegeldin. The addendum cautions members and encourages them to obtain the relevant information from the country that has issued the arrest warrant. This may certainly lead to a decision not to respect the request for cooperation forwarded by the red notice in the particular case, while another country may decide to disregard that information as it considered it to be irrelevant for its purpose (e.g. the extradition was denied by country A based on lack of dual criminality, while this problem will not arise if country C is asked to extradite that individual). I owe this point to Yaron Gottlieb.

¹¹⁵ According to Article 10 (5) (b) of the Processing Rules, "before publishing and circulating a notice (...) the General Secretariat shall assess whether it is necessary and advisable to do so, in the light of Articles 2 and 3 of the present Rules". As already mentioned, Article 2 of the Processing Rules requires that all the information is processed by Interpol "with due respect for the basic rights of individuals in conformity with (...) the Organization's Constitution and the Universal Declaration of Human Rights", whereas Article 3 forbids "any intervention (...) of a political, military, religious or racial character."

red notices, we now turn to the crucial question: are the mentioned tools adequate to satisfy the demanding purposes of the control? Is the General Secretariat able to ascertain the compliance of each request of red notice with the three mentioned requirements (rule of law, neutrality and legality)?

This question needs to be put in context. Red notices are processed within the General Secretariat by the Office of legal affairs, a rather small unit carrying out all the legal tasks of the organization. However, this processing is a major task: Interpol issues thousands of red notices every year (5,020 in 2009).¹¹⁶ One may infer from this the existence of a mismatch between workload and human resources. Observation of Interpol's practice, in effect, suggests that a full assessment of national requests is not systematically carried out, being it supplemented by a rather formal scrutiny.

As for the latter (formal scrutiny), it takes place on a regular basis before the issuing a notice. The General Secretariat, in fact, "shall ensure that the conditions attached to the given notice are met."¹¹⁷ These conditions are instrumental to the effectiveness of international cooperation: they serve to make a red notice consistent with some basic police cooperation requirements,¹¹⁸ whereas do not touch upon the ground of the warrant.¹¹⁹ Does this mean that the mentioned substantive requirements (rule of law, neutrality and legality) are forgotten in Interpol's practice?

This question is not easy to answer for an external observer. However, the evidence available seems to confirm that a substantive scrutiny mainly takes place in two hypotheses: when the requests conflicts with extradition law and when the charge openly or potentially amounts to a political offense.

¹¹⁶ See Interpol, *Notices* (2010), Fact Sheet COM/FS/2010-01/GI-02, available at <http://www.interpol.int/Public/ICPO/FactSheets/GI02.pdf>.

¹¹⁷ Article 37 (b) of the Implementing Rules. Interpol authorizes a notice if the national arrest warrant provides sufficient identity information "to allow for the co-operation requested to be effective", "references to an enforceable arrest warrant, court decision or other judicial documents are provided", and assurances that "extradition will be sought upon arrest of the person" (Article 37 (1) (a) (ii) of Implementing Rules). These conditions are examined *supra*, Section II.1.

¹¹⁸ See *supra*, Section II.3.

¹¹⁹ The assumption is that "the information is considered, *a priori*, to be accurate and relevant, if it has been provided by a National Central Bureau, an authorized national institution, or authorized international entity" (Article 10 (1) (b) of the Processing Rules).

With regard to the first hypothesis, if one accepts the qualification of a red notice as a “parasitic” administrative act (borrowing its legal force from the existing national and international norms concerning extradition),¹²⁰ it follows that, when there is a conflict with extradition norms, a red notice has very few chances to be honored. For this pragmatic reason, the General Secretariat, while processing requests of red notices, pays particular attention to consistency with extradition law. If, for instance, the wanted person is a president of another country, the red notice requested is not issued (or, if already published, it is immediately cancelled). Such a red notice, in fact, could hardly be implemented, given the conflict with the international law principle of immunity.¹²¹

The second hypothesis regards the control based on Article 3 of the Processing Rules, forbidding “any intervention (...) of a political, military, religious or racial character”. This control is easier to make when the charge is *prima facie* based on a political offence: in this case, Interpol immediately rejects the request.¹²² Other times, the control is more complex. When the nature of political offence is dubious – as in the case of Mr. Mr. Kazhegeldin or when the charge is related to terrorism¹²³ – the General Secretariat consults the

¹²⁰ *Supra*, Section II.3.

¹²¹ See Interpol press release, *Interpol statement on Honduras President Manuel Zelaya* (July 3, 2009), stressing that “Interpol’s jurisprudence based on international law prevents it from issuing a Red Notice for the arrest of any President, Head of State or Government unless it has been requested to do so by an international tribunal.” Accordingly, a request of red notice against President Zelaya has been rejected: Interpol press release, *Interpol will not issue Red Notice for arrest of President Manuel Zelaya* (July 7, 2009).

¹²² If, for instance, a country requests the publication of a red notice based on the charge of treason, the General Secretariat will generally not publish it, as this charge is considered a political offence in international extradition law and, therefore, also within the meaning of Article 3 of Interpol Constitution.

¹²³ UN Conventions qualify specific terrorist conducts as crimes that no longer enjoy the status of a political offence within the meaning of extradition law. However, when the charge concerns membership in a terrorist organization, the political nature of the offence resurfaces, because the meaning of “terrorist organization” in many countries is a salient political issue. Not surprisingly, Interpol refrains from engaging in a legal determination of what constitutes a “terrorist organization”. Rather, if Interpol receives a red notice request seeking the arrest of a person for the crime of membership in a terrorist organization, the General Secretariat requires the source of information to provide facts attesting to the illegal activities (e.g. bombing) of the particular group and to

requesting national central bureau in order to better assess the nature of the offence.¹²⁴ The reason of the special care devoted to the neutrality requirement is twofold. On the one hand, extradition law itself provides for the political offence exception: very few countries would extradite a person charged of treason. On the other hand, by checking this requirement, Interpol protects its own political neutrality and, hence, its capacity to foster international police cooperation. This stricter scrutiny is due to the convergence of functional and normative needs.

What, then, about the other two requirements, namely the respect of fundamental rights (rule of law) and of national and international norms that bind the member states (legality requirement)?

As for the latter, the impression is that Interpol jurisprudence tends to pragmatically narrow it, to the extent that only compliance with extradition law norms – as just explained – is carefully assessed.¹²⁵ Also the rule of law scrutiny appears to be less than systematic. This review is complex, given the variety of fundamental rights protected by Universal declaration of human rights. Yet, there is no need to stress its utmost importance. Imagine the case of a fugitive that, if apprehended and extradited in the requesting country, risks to face torture or inhuman treatments. In a similar case, the extradition would clearly violate the principle of *non-refoulement*.¹²⁶ Should

the meaningful link of the individual to that group, to ensure the request is not used as a form of a political tool.

¹²⁴ As a matter of practice, in case the red notice request contains both political and ordinary-law elements, Interpol applies the predominance test (which is used in international extradition law) to determine the overall nature of the case.

¹²⁵ Various reasons account for this choice: not only the over-breadth of the requirement and the natural tendency to focus on legal requirements that provide the act with an *effect utile*, but also the administrative workload and the relevance of time-factor in the circulation of the notice.

¹²⁶ The principle of *non-refoulement* is codified by Article 33(1) (A) of the 1951 Geneva Convention (United Nations Convention Relating to the Status of Refugees), which states that “No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion”. The principle is now recognized as *jus cogens* of international law. Therefore, all states, whether or not they are a party to conventions incorporating the prohibition against refoulement, are bound by the principle. See UNHCR, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW (2001). See also, for an updated overview, Kees Wouters, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT (2009).

Interpol accept a national request to issue a red notice in such circumstances? More generally, should Interpol's commitment to the rule of law (including the prohibition against *refoulement*) imply a systematic rejection of all the requests of red notice coming from member states with dubious human rights record?

It would be difficult to argue that Interpol's issuance of such a notice would be consistent with the respect of fundamental rights. Albeit indirectly, the issuance would run counter the obligation of all states not to return or extradite any person to a country where the life or safety of that person would be seriously endangered.¹²⁷ The same principle also applies when the person to be extradited would be deprived of internationally recognized rights of defense in the requesting state.¹²⁸ No exceptions to the ban of *refoulement* are allowed.¹²⁹

¹²⁷ Various international treaties on terrorism and extradition enshrine the principle of non-*refoulement*. The European Convention on Extradition, for instance, prohibits extradition in cases where a state party has "substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons" (Article 3(2)). An analogous provision can be found in Article 3 (b) of the UN Model Treaty on Extradition (adopted by General Assembly resolution 45/116, as amended by General Assembly resolution 52/88). See International Helsinki Federation for Human Rights (IHF), *ANTI-TERRORISM MEASURES, SECURITY AND HUMAN RIGHTS – DEVELOPMENTS IN EUROPE, CENTRAL ASIA AND NORTH AMERICA IN THE AFTERMATH OF SEPTEMBER 167-183* (2003).

¹²⁸ See Council of Europe, Explanatory Report on the European Convention on the Suppression of Terrorism (ETS no. 090), para 50. See also Guidelines of the Committee of the Ministers of the Council on Europe on human rights and the fight against terrorism, adopted on 15 July 2002, where the standard is further elaborated: "When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition" (para. XIII (4)).

¹²⁹ According to Article 33 (2) of the 1951 Geneva Convention, the ban does not apply to a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." However, this provision is only applicable when it is proved that there is a direct link between the presence of a refugee in the territory of a particular country and a national security threat to that country: see Human Rights Watch, *HUMAN RIGHTS IMPLICATIONS OF EUROPEAN UNION INTERNAL SECURITY PROPOSALS AND MEASURES IN THE*

However, an affirmative answer to those questions would put Interpol in a politically uncomfortable situation, due to the tension that may arise with the member whose request is found to violate a basic right. Moreover, such a strict application of the rule of law requirement would ultimately threaten the basis for police cooperation with most African and Asian countries. A possible way out is the existence of a ruling by a regional human rights courts as “objective” ground to refuse certain requests.¹³⁰ And, yet, this way out is rarely available. In the remaining cases, Interpol does not seem to consistently control this requirement, at least not *ex ante*.¹³¹

Take the case of Abdul Rasoul Mazraeh, an Iranian citizen and a recognized refugee in Syria. Despite his refugee status (perhaps ignored by the General Secretariat at the time of the Iranian request), Interpol publishes a red notice against Mr. Mazraeh, thus inadvertently violating the principle of *non-refoulement*. On the basis of that notice, on 11 May 2006 the Syrian government arrests Mr. Mazraeh and on 15 May 2006 extradits him to Iran. Once in Iran, Mr. Mazraeh is detained for two years without being put on trial and is subject to various kinds of torture and violence with permanent physical consequences.¹³²

AFTERMATH OF THE 11 SEPTEMBER ATTACKS IN THE UNITED STATE (2001). More importantly, according the jurisprudence of the UN Human Rights Committee and the European Court of Human Rights (developed under Article 7 of the ICCPR and Article 3 of the ECHR, respectively), the ban on refoulement is absolute and does not admit derogation. See European Court of Human Rights, *Soering v. United Kingdom*, Application No 14038/88, 11 EUROPEAN HUMAN RIGHTS REPORTS 439 (1989).

¹³⁰ If a regional court of human rights holds that a national court or criminal procedure violates a human rights convention to which the country is a party (as it happens, for instance, with regard to courts and procedures created for the purpose of adjudicating terrorism), Interpol advises the country that no red notice may be published in case the underlying arrest warrant has been issued by that court or according to that procedure. Not only the publication would be in violation of Article 2(1) of Interpol Constitution. It would also run counter the rule – stemming from Article 10 (1) (a) (5) of the Processing Rules – that, as an international organization, Interpol cannot assist a member country in violating its international obligations deriving from the human rights convention.

¹³¹ On Interpol’s *ex post* scrutiny see also *infra*, III.1.2.

¹³² According to the allegations in the report of the UN Special Rapporteur, “since his arrest he has not had access to a lawyer and has been detained in solitary confinement. Mr. Mazraeh is expected to go on trial in March [2008], however, it remains unclear what charges are put against him. He was physically and

This case may well be a particularly unfortunate and isolated episode. Nonetheless, it seriously questions the ability of Interpol's General Secretariat to adequately investigate all national requests and, ultimately, to hold its commitment to protect human rights. It, rather, seems that the only systematic check is the formal one, whereas Interpol delves into the substantive ground of a request only when it is necessary to preserve its political neutrality or the effectiveness of a notice.¹³³ If so, the General Secretariat's *ex ante* scrutiny is driven by functional concerns (as those related to compliance with extradition law and neutrality requirements), rather than by normative concerns (as the ones more directly related to the rule of law and to general legality requirements).

III.1.2. Ex post review

Interpol basic norms discipline another mechanism of review, additional to the scrutiny over national requests by the General Secretariat. This second control essentially takes place *ex post* and is committed to an independent body: the Commission for the control of data files (CCF).¹³⁴ The CCF is composed of five members, "appointed because of their expertise and in such a way as to allow

mentally ill-treated while in detention. As a result, he carries blood in his urine, his liver and kidneys are not functioning and he lost all of his teeth. Furthermore, he is paralysed because spine has been damaged." See United Nations General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Addendum, A/HRC/7/3/Add.1 124-125 (February 19, 2008).

¹³³ This would explain why – as Interpol itself frequently reiterate – “the issuance or non-issuance of a red notice for any individual cannot be construed as an indication of the strength or weakness of the case against that individual, which is a matter for the appropriate judicial authorities to decide”: Interpol press release, *Interpol statement clarifying its role in case involving Iranian minister wanted by Argentina* (September 4, 2009).

¹³⁴ The origin of the CCF goes back to the Headquarters Agreement signed by France and Interpol on 3 November 1982. The Agreement, come into force on 14 February 1984, provided for internal control of Interpol's archives by an independent body (Article 8 of the Headquarters Agreement), rather than by a national supervisory board, as the French government had initially proposed. The procedure of review is now disciplined by the Rules on the control of information and access to Interpol's files (hereinafter, “Control Rules”) and to the Operating rules of the Commission for the control of Interpol's files (hereinafter, CCF Operating Rules).

the Commission to carry out its mission completely independently”.¹³⁵

The CCF examines two categories of individual requests, concerning respectively: *a)* one’s right to access the information contained in Interpol’s databases against her;¹³⁶ *b)* the guarantee that the processing of information “conform to all the relevant rules adopted by the Organization” and does “not infringe the basic rights of the people concerned”.¹³⁷ Both these individual requests are processed through an highly formalized review procedure.

The wanted person may submit a request to challenge the validity of a red notice both on formal grounds (e.g. the underlying arrest warrant has expired in the requesting country) and on substantive ones (e.g. the arrest warrant is an attempt to politically persecute that individual). When the CCF receives a request, it transmits to the General Secretariat a copy of any request calling into question the processing of information, and informs the requesting party of the applicable procedure and deadlines.¹³⁸ If the CCF considers the request to be inadmissible, it has to give the reasons.¹³⁹

In examining the request, the CCF “may ask the General Secretariat or any other person or entity for further information to be provided within a specified period.”¹⁴⁰ In particular, the CCF may

¹³⁵ Article 2 (a) of the Control Rules. The five members comprise a senior judicial or data protection official as chairperson, two senior data protection experts, a senior electronic data processing expert, and an expert with recognized international experience in police matters. They are appointed by the General Assembly from amongst the candidates put forward by Member States and selected by the Executive Committee (Article 2 (b)). In the exercise of their duties, the members of the CCF “shall neither solicit nor accept instructions from any persons or bodies, and shall be bound by professional secrecy” (Article 5 (e) (1)).

¹³⁶ Article 9 (a) of the Control Rules. On this internal mechanism of control, more specifically related to the right to informational self-determination and hence less relevant to our discussion, see Schöndorf-Haubold, *supra* note 58, at 1745-1747.

¹³⁷ Article 1 (a) and 4 (a) of the Control Rules.

¹³⁸ See Articles 6, 7 and 12 of the CCF Operating Rules. The decision on the admissibility of the request has to be taken “as soon as possible, generally during the session immediately following receipt of the said request” (Article 12 (1)).

¹³⁹ Article 12 (4) of the CCF Operating Rules. See also Article 13 (2): “If the request is rejected in whole or in part, the Commission shall explain its reasons to the requesting party.”

¹⁴⁰ Article 18 (2) of the CCF Operation Rules.

invite the General Secretariat to carry out a preliminary study of any requests that call into question the processing of information.¹⁴¹ However, an oral hearing of the requesting party is only exceptionally allowed.¹⁴² On the basis of the information collected, the CCF adopts reasoned conclusions and recommendations.¹⁴³

The CCF's *ex post* review would seem, thus, to fill the main gaps of the *ex ante* scrutiny: the conformity with the rule of law and the legality requirements, though not consistently checked before the publishing of a red notice, could still be assessed after the issuing on demand of the fugitive. Put differently, Interpol's legal accountability would rely on a "fire alarm" – rather than "police patrol" – mechanism.¹⁴⁴

Nonetheless, the impact of CCF's review on the red notices system should not be overstated. To begin with, the CCF does not intervene *ex officio*,¹⁴⁵ but *ex parte*, on demand of the concerned person. This implies that the remedy is construed as an *ex post* review: access to the CCF only happens after the wanted person knows about the red notice, that is, once the notice has been already

¹⁴¹ Article 17 (1) of the CCF Operation Rules. The General Secretariat itself may submit a reasoned request to the Commission when it considers that additional details are necessary from the requesting party. If the CCF decides to admit the request, it invites the requesting party to supply the details (Article 17 (3) and (4) of the CCF Operation Rules).

¹⁴² See Article 22 of the CCF Operation Rules: "The Commission shall not meet requesting parties, or their duly appointed agents or legal representatives, other than in exceptional circumstances if, after examining the case, it considers this necessary."

¹⁴³ Within one month, the CCF also notifies the requesting party "that it has carried out the required checks" (Article 18 (1) and (4) of the CCF Operation Rules). Re-examination of the request is admitted only under certain conditions: see Article 19 (1) of the CCF Operation Rules, providing that "An application for re-examination of a request by the Commission may be made by the requesting party only when it is based on the discovery of a fact which would probably have led to a different conclusion if that fact had been known at the time the request was processed."

¹⁴⁴ Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms*, 28 AMERICAN JOURNAL OF POLITICAL SCIENCE 165 (1984).

¹⁴⁵ The only exception – of limited relevance to our problem – is Article 4 (d), allowing that "The Commission may also decide to carry out controls in the context of its spot checks."

published.¹⁴⁶ Only from that moment, and until the possible arrest, access to CCF may help to protect the interest of the fugitive not to be apprehended by a foreign police.¹⁴⁷ After the detention, however, the review may still have relevance. If the wanted person is released, the cancellation of the notice contributes to avoid further arrests while travelling in other states (as happened in the Kazakh case). Therefore, the control of the CCF is an *ex post* remedy that is not foreseen as a relief from detention, but only serves as prevention of further (unjust) arrests.

Within these limits, access to the CCF may eventually provide a scrutiny on the compliance of the notice with the rule of law and legality requirements. Yet, that scrutiny is different from a proper judicial review in many respects. Just like the General Secretariat, the CCF can only check the validity of charges and not their accuracy: it cannot take over from the judicial authorities by checking or amending charges, given the necessity to respect national sovereignty. Another important limitation is that the CCF cannot assess the legal situation in a member country with a view to giving an opinion on the validity of an arrest warrant or a legal decision. In addition, the CCF has merely advisory power: when doubts are raised in relation to a red notice, the CCF may only recommend the General Secretariat to apply precautionary measures or to cancel a red notice,¹⁴⁸ whereas it is not empowered to process police information itself. Finally, every member state may challenge the General Secretariat's decision based on CCF's advice, subjecting

¹⁴⁶ There is nothing in Interpol rules that prevents an individual from submitting an *ex ante* request to the CCF. The wanted person may issue a "preventive request" that, if a red notice is asked for, it should not be published for the alleged reasons. In such case, the information provided by the individual could be taken into account upon reviewing the request (if submitted) and may lead to the application of the procedure in Article 10.1(c) of Processing Rules: "if there is any doubt about whether the criteria for processing an item of information are being met, the General Secretariat shall consult the source of that information, or the National Central Bureau concerned". However, in practice, this may only happen when rumours about a prospective red notice spread out.

¹⁴⁷ After the arrest, being the personal freedom of the concerned person already compromised, the CCF's intervention loses (part of) its significance, because a more effective remedy becomes available, namely the validation of the arrest and review of the warrant by a domestic judge.

¹⁴⁸ These faculties are exercised by the CCF pursuant to Article 5 (e) (3-4) and Article 6 (a) of Control Rules.

it to a dispute settlement procedure with the Executive Committee and the General Assembly as decision-making bodies.

To sum up, this *ex post* administrative or quasi-judicial review constitute an important mechanism of individual appeal against a red notice. However, it ensures a low level of protection to personal freedom for three main reasons. Firstly, it comes late, often after a first arrest and detention. Secondly, it is deferent to national sovereignty to the extent that it cannot question neither a domestic appreciation of the charges, nor the human rights record of the concerned country. Thirdly, it is contingent upon a diplomatic procedure of appeal where political considerations may easily prevail over legal criteria.

III.2. The AMIA case: the political control

The AMIA case is perhaps the most controversial of all Interpol's jurisprudence. It originates from the 1994 terrorist bombing of the Jewish community centre (the Asociacion Mutual Israelita de Argentina – AMIA) in Buenos Aires, in which 85 people were killed and 300 more injured. In 2003, controversial Judge Galeano, the investigating Argentinian magistrate, accuses the government of Iran of directing the bombing. Hence, he issues twelve arrest warrants against Iran's high officials. In November 2003, following a request by Argentina, Interpol publishes the corresponding red notices.

As in the Kazakh case, the consistency of the allegations is highly dubious and, yet, productive of consequences. One of the warrants signed by Judge Galeano includes Hadi Soleimanpour, Iran's ambassador to Argentina at the time of the bombing. On 21 August 2003, Mr. Soleimanpour is arrested in the UK, put in prison for more than one month and eventually released by the British authorities, because the evidence presented does not support a *prima facie* case for extradition. Nonetheless, Interpol does not cancel the notice.

In September 2004, an Argentinean court finds that Judge Galeano had engaged in “substantial violations of the rules of due process” and “irregular and illegal actions”. Only at that point, Interpol suspends all twelve red notices and asks both Iran and Argentina for additional information. The two countries present their cases to Interpol's Executive Committee, which unanimously orders the cancellation of the red notices. The decision is upheld by the General

Assembly in September 2005.¹⁴⁹ The “first round” of the dispute is, thus, settled.

The AMIA case resurfaces at Interpol level one year later. In October 2006, Argentine new prosecutors formally accuse both the government of Iran of involvement in the 1994 attack, and the Hezbollah militia of carrying it out. One month later, on request of Argentinean National Central Bureau, Interpol publishes nine new red notices in connection with the case. The notices concern eight Iranian nationals and one Lebanese national, all suspected of involvement in the 1994 strike. The Iranian government criticizes both the investigation conducted in Argentina and the decision of Interpol's Executive Committee, dismissed as part of “a Zionist plot”.

Once again, the two parties cannot resolve the matter bilaterally and a new procedure of dispute resolution begins. This time, however, the outcome is different. In March 2007, the Executive Committee endorses the conclusions of a report prepared by the Office of Legal Affairs of Interpol's General Secretariat and unanimously decides to authorize the issuance of six (out of nine) red notices requested by Buenos Aires.¹⁵⁰ The appeal of Tehran against the decision suspends the publication of the notices until the next meeting of the General Assembly. On 7 November 2007, the General Assembly upholds the decision of the Executive Committee.¹⁵¹ As a result, six red notices start circulating (and are still pending) in connection to the AMIA case. They concern senior Iranian officials, including the current minister of defense Ahmad Vahidi.¹⁵²

¹⁴⁹ On the “first round” of the AMIA case, Interpol press release, *Argentinean Red Notices for Iranian officials cancelled. Decision upheld by delegates at Interpol General Assembly* (September 27, 2005). See also Larry Rother, *Argentines criticize investigation of '94 attack*, NEW YORK TIMES (July 19, 2004).

¹⁵⁰ Interpol press release, *supra* note 73: “after long and careful deliberation of all the information and arguments presented by both parties, the Executive Committee concluded that the reasons for having the Red Notices cancelled in 2005 were not present in 2007.”

¹⁵¹ On the “second round” of the AMIA case, Interpol press release, *supra* note 73. The AMIA case has received extensive media coverage. See also Hernán Cappiello, *Acusan a Irán por el ataque a la AMIA*, LA NACIÓN (October 26, 2006).

¹⁵² See David Batty and James Sturcke, *Iran appoints bombing suspect as defense minister*, THE GUARDIAN (September 3, 2009). By contrast, following the

This controversial decision – seen by Iran and other member states as demonstration of the Western influence on Interpol – will hardly obtain execution: unless the wanted persons travel abroad, their countries of residence will never extradite or process them for the alleged charge. Yet, that decision brings about a worldwide “naming and shaming” effect that further compromises the image of the Iranian leadership.¹⁵³ Conversely, the decision also obfuscates Interpol impartiality, especially if contrasted to General Secretariat’s concurrent dismissal of an Iranian request of red notices against Israeli officials.¹⁵⁴ It is, thus, not surprising that Interpol is still struggling to set itself as impartial mediator in the AMIA dispute and to achieve a more satisfactory solution for the parties.¹⁵⁵

III.2.1. Diplomatic review

When a dispute arises between member states, and it cannot be solved by bilateral consultation, the matter is submitted in first instance to Interpol Executive Committee and in second instance to the General Assembly.¹⁵⁶ This dispute-settlement mechanism is the

advice of the Secretariat General, Interpol’s Executive Committee did not authorize the publication of arrest warrants concerning influential Iranian politicians, such as the former Iranian president Ayatollah Akbar Hashemi Rafsanjani (currently chairman of Iran’s Assembly of Experts), the former Iranian foreign minister Ali Akbar Velayati (now chief foreign policy advisor to Iran’s Supreme Leader Ayatollah Ali Khamenei) and former Ambassador of Iran in Buenos Aires, Hadi Soleimanpour.

¹⁵³ In September 2009, Interpol General Secretariat felt the need to publicly reaffirm that the issuance of a red notice “cannot be construed as an indication of the strength or weakness of the case”, while at the same time conceding that “many of Interpol’s member countries consider a Red Notice a valid request for provisional arrest, especially if they are linked to the requesting country via a bilateral extradition treaty”: Interpol press release, *Interpol statement clarifying its role in case involving Iranian minister wanted by Argentina* (September 4, 2009).

¹⁵⁴ See Interpol press release, *Interpol statement on Iranian request for issue of Red Notices* (March 10, 2009) and the discussion of the case *supra*, Section I.2.

¹⁵⁵ See Interpol media release, *Interpol hosts Argentina-Iran meeting for continued dialogue over 15-year-old AMIA terrorist incident* (March 12, 2010), communicating with some discomfort that «during the 10 March 2010 meeting, a practical suggestion was discussed that would designate Interpol as the conduit by which information would be exchanged between both countries. At the conclusion of that meeting, even that suggestion seemed unacceptable. Frequently, countries prefer to use diplomatic channels.»

¹⁵⁶ Article 24 of the Processing Rules, concerning the “settlement of disputes”, provides: “Disputes that arise between National Central Bureaus, authorized

rule applied in the AMIA case: it was the Iranian opposition to the Argentinean request that led to the first decision of the Executive Committee and to the final decision of the General Assembly on appeal by Teheran. Interpol institutions had to step in and review the ground of the Argentinean arrest warrant because of the opposition by Iran, which ultimately managed to prevent the publication of a notice for three of its citizens. State opposition to the issuing of a red notice, thus, proved to be an effective remedy.

In order to appreciate the importance of this indirect mechanism of review for the protection of a fundamental right, a comparison with a similar global regime can be helpful. Consider the well-known power of the UN Security Council to name suspect terrorists in a black list and have their assets seized with the aim to prevent the funding of terrorist activities. The Sanctions Committee, an auxiliary body of the UN Security Council, administers this mechanism. Established in 1999, this committee is composed of representatives of the members of the Security Council. Its task is to draft and update the list of persons and organizations suspected of funding terrorist activities (“global black list”). Once a person is included in the list, all the UN members have the duty to freeze its asset.¹⁵⁷

The obvious difference between the two international administrative acts pertains to the legal nature: UN measures are binding to the member states, whereas Interpol red notices are not binding, at least not formally. A second difference regards “bottom-up” review: once the international measure has been implemented, domestic courts subject to *ex post* scrutiny any Interpol-sanctioned foreign arrest warrant, whereas are reluctant to review the legality of UN-sanctioned asset-freezing measures (with the relevant exception of the EU Court of Justice).¹⁵⁸ In the latter (UN) case, the legal “black hole” is, thus, more worrisome.

national institutions, authorized international entities, or between one of these entities and the General Secretariat in connection with the application of the present Rules and the implementing rules to which they refer, should be solved by concerted consultation. If this fails, the matter may be submitted to the Executive Committee and, if necessary, to the General Assembly in conformity with the procedure to be established.”

¹⁵⁷ See UN Security Council Resolution 1267 (1999), paragraphs 6 and 9-13.

¹⁵⁸ The obvious reference is to the position held by the European Court of Justice in its ruling on the *Kadi* case: see European Court of Justice, *Kadi v. Council of the European Union*, case C-402/05 P, 3 September 2008.

However, some substantive analogies with the instrument of red notices should be noted. First, also the Sanctions Committee adopts an “international administrative act” that impinges upon a fundamental freedom of the individual (namely, private property). The formal difference (UN decisions are legally binding while Interpol notices are not) is less relevant in practice, because both the UN decisions and the Interpol notices enjoy – albeit to a different extent – a high degree of compliance.

Second, also in the case of the UN, the original source of the international decision is national: the listing process, in fact, depends on the initiative of a member state. The request of the designating government is often based on a judicial decision.¹⁵⁹ Moreover, the relevant state usually has already included the suspect in the “domestic black list” and seeks the UN approval in order to extend the reach of its ban worldwide. Here, the similarity of the bottom-up procedure is evident.

The third analogy directly relates to the mechanism of indirect protection. Absent any judicial remedy at UN level,¹⁶⁰ if objections are raised against the inclusion of a person in the global black list, it is for the UN Security Council to take the final decision. Just like with Interpol dispute settlement, every single state has the power to object, thereby shifting the decision to the main political body.

A fourth analogy concerns private participation. UN rules allow the individual to enable the diplomatic procedure of review, in order to obtain de-listing, in two ways: indirectly, by petitioning the government of residence or citizenship to request a re-examination of the case, or directly, by submitting a request through a newly established focal point.¹⁶¹ Yet, the individual enjoys no right to have the decision reviewed: if the petitioned government rejects its citizen’s request or if after one month from the direct petition to the

¹⁵⁹ Albeit also an administrative decision is deemed sufficient to determine the listing of a suspect terrorist: admittedly, here the UN regime grants less protection to civil liberties than Interpol rules, which require a judicial involvement for the issuing of an arrest warrant.

¹⁶⁰ The competence of the International Court of Justice does not extend to the decisions of UN bodies.

¹⁶¹ The focal point for de-listing was established in 2007 pursuant to UN Security Council resolution 1730 (2006).

UN no member state recommends de-listing, the procedure comes to an end without reconsideration of that position.¹⁶²

Also Interpol rules allow the individual to enable the diplomatic review by petitioning a government.¹⁶³ On the contrary, as far as the hypothesis of direct petition is concerned, Interpol regime provides a full right to have the decision reviewed. In fact, as we have seen, the concerned person may submit a request of re-examination directly to the CCF, which, in turn, has the duty to process the request, to give reasons in case of rejection and to inform the petitioning person about the initiatives assumed on the basis of her request. However, this higher standard of protection has a limited impact, due to the mere advisory role of the CCF and to a second-order adjudication of the dispute through the diplomatic procedure.¹⁶⁴ In the latter respect, UN and Interpol regimes are similar – and this is the point that I want to stress here – insofar as the (final) re-examination of the decision is entrusted to a political body.

So much granted, the issue is whether this common mechanism of appeal, being diplomatic in character, is adequate to review the legality of a request of notice and to protect fundamental rights.

To begin with, Interpol's dispute settlement institutions – the Executive Committee and the General Assembly – are neither judicial nor independent bodies. They settle disputes by majority voting. This voting rule facilitates the achievement of a solution in case of firm opposition by a state (or group of states), but it also raises the risk of fomenting an opposition between geopolitical blocs

¹⁶² See Article 8 of Guidelines of the 1267 Committee for the Conduct of its Work, as amended in February 2008. See also UN Security Council resolutions 1730 (2006) and 1735 (2006).

¹⁶³ Article 24 of Processing Rules refers to “Disputes that arise between National Central Bureaus, authorized national institutions, authorized international entities, or between one of these entities and the General Secretariat in connection with the application of the present Rules and the implementing rules to which they refer”. In practice, nothing in the wording of this provision precludes a state from raising an objection against a red notice upon request of its named citizen, even though this provision does not explicitly foresee this possibility.

¹⁶⁴ In Interpol's regime, the diplomatic procedure overlaps with both the *ex ante* scrutiny by the General Secretariat and the *ex post* review by the CCF: whatever is the decision of those administrative bodies, it can be challenged by a member state and overturned by a final political decision. This happens not only when the wanted person is a citizen of the requesting state (Kazakh case), but also when the wanted person is a citizen of another country (AMIA case).

that would ultimately impair international cooperation. Interpol's political it, thus, at risk.

More importantly, in order to de-politicize the issue, Interpol's political bodies often ask the Secretariat General for a technical (legal) advice.¹⁶⁵ However, the political nature of this decision-making does not guarantee that the final decision has a sound legal ground. Take the final stage of the Kazakh case. The General Secretariat had already revoked the notice after having reviewed it and concluded that the allegations amounted to a political offense. The Executive Committee unanimously upheld the decision, clearly based on a general principle of extradition law. Nonetheless, the General Assembly decided otherwise by a thin majority (48 in favour, 38 against, and 23 abstentions) and without stating any reason.¹⁶⁶ After having clarified that "there can be no further review of this matter by Interpol", Secretary General Ronald K. Noble commented this settlement of the dispute as follows: "Interpol is a democratic organisation, and when our members have expressed their will through the democratic process, the General Secretariat moves promptly – as in this case – to implement the member states' decision."¹⁶⁷

This telling statement raises two questions. First: how effective the implementation of a red notice can be in similar cases, given its non-binding nature and the open opposition of a considerable number of member states? Second: what kind of "democracy" is the one in which the will of the majority (of states) is allowed to trump the legal guarantees established to protect a fundamental right?

These questions are indeed rhetorical.¹⁶⁸ They show that, in Interpol's system to process red notices, something is missing in

¹⁶⁵ As mentioned above, in the AMIA case the political decision has been prepared by a report on the issue by the Office of legal affairs of the Secretariat General. Due to the high political salience of the case, seriously threatening Interpol's political neutrality, it is not surprising that both the Executive Committee (unanimously) and the General Assembly (by majority) followed the legal advice of the General Secretariat.

¹⁶⁶ *Supra*, Section III.1.

¹⁶⁷ Interpol press release, *Interpol re-issue of red notice on former Kazakhstan PM* (October 24, 2002).

¹⁶⁸ I assume: *a)* that the red notice against Mr. Kazhegeldin, formally approved within the Assembly General only by 48 states, will be honored by few among Interpol's 188 members; *b)* that there is no need to disturb the founding fathers of the American Constitution for acknowledging that Interpol "democratic process" reproduces at international level a "tyranny of the many" which is

terms of legal accountability. At administrative level, the scrutiny is based on a narrow legality review, selectively carried out and mainly focusing on extradition law requirements. At political (appeal) level, even this thin legal ground is lost: once the issue has entered the dispute-settlement engine, a majoritarian logic replaces a proper legal assessment. Ironically enough, this logic also runs counter to Interpol's functional needs: the marginalization of legal arguments makes the political game more open, thereby piercing the veil of Interpol's neutrality.

III.3. Any room for improvement?

As far as Interpol's most know instrument is concerned (red notices), we have seen that various tools and procedures have been adopted to check Interpol "soft" power. This confirms that global governance and the rule of law do not necessarily follow divergent paths, even when the organization concerned has a strong functional orientation, as in the case of Interpol.

Nonetheless, the analysis carried out above has revealed that the administrative mechanisms of control are affected by serious limitations and that the diplomatic procedure of review is fundamentally inadequate. These flaws risk to make Interpol's commitment to respect "the limits of the laws existing in the different countries" and "the spirit of the 'Universal Declaration of Human Rights'" untenable.¹⁶⁹

A more general point is in order. On the one hand, in the global arena, the protection afforded to individuals against action taken by international institutions is rarely satisfactory. Two main reasons stand out. First, international regulatory regimes are generally established to keep national powers under control. The power-checking purpose of global rules is directed towards national administrations, rather than towards the international ones. This is why judicial protection is rarely guaranteed by those regimes. Second, legal accountability gaps are difficult to close: absent a global constitution and an established hierarchy of norms, the

equivalent – when the decision concern a basic individual right – to the majoritarian tyranny countered by domestic constitutionalism in the last two centuries.

¹⁶⁹ Article 2 of the Interpol Constitution.

fragmented character of the global legal sphere does not favour the emergence of common general principles.¹⁷⁰

On the other hand, there are important signs of development. On the one hand, it is noticeable that more than one hundred extra-national courts operate in the global arena,¹⁷¹ and many other surrogate mechanism are available, taking the form of independent or quasi-judicial bodies, inspection panels, compliance committees.¹⁷² On the other hand, despite the absence of general legal principles, some “common understandings” are emerging: “the duty to respect human rights and the rule of law; the obligation to inform and to hear interested parties before a decision is taken (...);

¹⁷⁰ See Sabino Cassese, *A Global Due Process of Law?*, Paper presented at New York University, Hauser Colloquium on Globalization and Its Discontents, September 13, 2006 (<http://www.law.nyu.edu/kingsburyb/fall06/globalization/papers/Cassese.doc>).

¹⁷¹ See the synoptic chart of the Project on International Courts and Tribunals (PICT project), at http://www.pict-pecti.org/publications/synoptic_chart/synop_c4.pdf. See also Yuval Shany, *REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL* (2007) (exploring the issue of jurisdictional overlaps between international courts and tribunals, which threatens the unity of international law); CIVIL SOCIETY, *INTERNATIONAL COURTS AND COMPLIANCE BODIES* (Tullio Treves et al. eds., 2004) (analyzing the role of non-state actors in their relation with international tribunals, courts and compliance mechanisms); Chester Brown, *A COMMON LAW OF INTERNATIONAL ADJUDICATION* (2004) (observing an increasing commonality in the practice of international courts to the application of rules concerning issues of procedure and remedies).

¹⁷² It is enough to mention two examples: the Inspection Panel of the World Bank and the Compliance Committee established by the Aarhus Convention. On the former, see Enrique R. Carrasco and Alison K. Guernsey, *The World Bank's Inspection Panel: Promoting True Accountability through Arbitration*, 41 CORNELL INTERNATIONAL LAW JOURNAL 577 (2008); Mariarita Circi, *The World Bank Inspection Panel: is it really effective?*, 6 GLOBAL JURIST ADVANCES (2006) (at <http://www.bepress.com/gj/advances/vol6/iss3/art10>); Jonathan A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 GLOBAL GOVERNANCE 279 (2000). On the latter, see Marco Macchia, *Legality: The Aarhus Convention and the Compliance Committee*, in GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES 71 (Sabino Cassese et al. eds., 2008) (at <http://www.iilj.org/GAL/documents/GALCasebook2008.pdf>); Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 Colorado Journal of International Environmental Law and Policy 373 (2007).

a number of due process obligations; and substantive duties relating to principles of fairness and reasonableness, amongst others.”¹⁷³

If one observes the system of Interpol red notices in the context of this fast-moving picture, the impression is that some margins for improvement are available. Interpol’s combination of rules and procedures of *ex ante* and *ex post* review is not sufficient to close relevant gaps in the protection of individual rights, as the cases discussed above make clear. A final question, thus, remains on the floor: is there any conceivable way to fill those accountability gaps without, at the same time, disrupting the functional pillars – deference to national sovereignty and appearance of political neutrality – on which international police cooperation (and Interpol’s success) is built?¹⁷⁴

III.3.1. The analytical framework: red notices and global administrative procedures

The power to issue red notices is exercised through a procedure that, for the sake of clarity, can be understood as a mixed or composite one, half international and half national.¹⁷⁵ The first phase of the procedure is bottom-up: it presupposes the adoption of an arrest warrant at national level, it begins with a request from a state (through a national central bureau) to publish a red notice, it proceeds with the examination of the request (Interpol’s Secretariat General assess request’s compliance with the internal rules) and it results in the issuing of a red notice (unless a member objects, in which case a further sub-phase is opened to settle the dispute). The second stage of the procedure is top-down: once the notice is published and circulated to national central bureaus, the relevant national office processes the “soft” international act and decides whether to turn it into a binding (thus “hard”) administrative act. Despite the lack of a comprehensive discipline (Interpol rules only regulate the bottom-up phase, while the top-down stage is

¹⁷³ Cassese, *supra* note 10, at 767.

¹⁷⁴ On the tension between functional and normative concerns at Interpol level, see *supra*, Section I.2.

¹⁷⁵ On mixed administrative procedures at global level, see Cassese, *supra* note 10, at 680-4; Giacinto della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 EUROPEAN PUBLIC LAW 563 (2003); Manuela Veronelli, *Shared Powers: Global and National Proceedings under the International Patent Cooperation Treaty*, in GLOBAL ADMINISTRATIVE LAW, *supra* note 172, at 50.

disciplined at domestic level), this procedure can be considered unitary, because unitary is the aim, namely to add transnational effects to an arrest warrant that would otherwise only produce effects within the borders of the issuing country.

This modelling exercise highlights the way administrative discretion is allocated along the procedure. *In principle*, Interpol decides as to the *virtual* global reach of a domestic warrant, while national authorities decide as to the *actual* domestic effects of that warrant. *In practice*, if a national central bureau routinely gives automatic recognition to Interpol-sponsored warrants (as it is often the case), then the *virtual* and the *actual* dimensions *collapse and conflate*: the national recognition becomes a mere formality. In this case, the discretionary power, which *in principle* would be distributed between Interpol and the national central bureau along the virtual/actual divide, *in effect* is shifted at international level and, thus, attracted in the hands of Interpol. In short, if a national central bureau commits itself to honor a red notice, then the top-down phase of the procedure becomes a rubber-stamp exercise of Interpol decisions.¹⁷⁶ Nevertheless, my claim is that *whenever* an automatic recognition of a red notice takes place, the consequence is that Interpol exercises the whole amount of discretion and ultimately weights the global interest to security (pursued by means of police cooperation) against the individual right to personal freedom.

What are the implications for the protection of the concerned individual, who, despite the general principle of presumption of innocence, risk to be deprived of her personal freedom and spend days or weeks in unpleasant and possibly dangerous prisons?

The first implication of the above mentioned construction is plain: in order to check the discretionary power enjoyed by Interpol, it is necessary to discipline this global proceeding by the rule of law. Principles of due process, like the right to a hearing, the duty to provide a reasoned decision, the duty to disclose all relevant information and the right to judicial review, should be incorporated. Already at this point, I imagine the discouraged reaction of an ideal official of Interpol, whose governance mindset instinctively rejects

¹⁷⁶ Admittedly, this practice is not universal: there are states – for instance the U.S. – that reject this “blind” commitment. Also, it might well be the case that some states decide to honor a red notice only after reviewing the identity of the requesting country to ensure an extradition treaty exists between the two countries (which is a sort of ex-ante examination on the national level).

the “legalization” perspective as an inevitable damage to smooth and effective police cooperation. Not to lose that precious reader, I do not indulge on this point and immediately turn to a second implication: due to the composite structure of the procedure, principles of due process need to be incorporated, but not necessarily at international level. If the procedure at stake is construed as a mixed one, we can imagine two different procedural paths: a “centralized” one, in which all the mentioned safeguards are established in the bottom-up phase, that is, at Interpol level; and a “decentralized” one, in which due process guarantees are, instead, granted at domestic level, thus in the bottom-up phase.

The “centralized” model, if properly established (with the formalization of red notices as international arrest warrants, adequate procedural guarantees and effective judicial review), perhaps would be the optimal solution from a legal standpoint: the discretionary power would be checked at the level where it is exercised, without running into the risk of state failures. Yet, it is politically unrealistic and functionally damaging, because it would disrupt the principle of state sovereignty on which international cooperation in this field is built. The decentralized model, by contrast, represents the *status quo*: a situation that is inadequate from a legal standpoint (as emerged in the discussion of the Kazakh case) and that is becoming untenable also from a functional standpoint (as the mentioned AMIA case illustrates).

III.3.2. In search of a balance: due process in context

In some cases, the choice between centralization and decentralization is not available. The right to a hearing, for instance, cannot be granted to a suspect criminal before his material apprehension, because the “surprise effect” has to be preserved, being it essential to the effectiveness of the warrant. Therefore, there is no option but to postpone the hearing of the suspect after the arrest, with all the consequent guarantees stemming from domestic constitutional guarantees and the application of criminal procedures. However, this innovation would be of limited importance, due to the existence of more effective judicial remedies at domestic level.¹⁷⁷ The only useful, albeit thin, addition we can imagine is the setting of an Interpol standard to make clear that it is a precise duty of the

¹⁷⁷ I refer to the validation of the arrest and review of the warrant by a domestic judge. See also *supra*, Section III.1.2.

recipient member state to hear the arrested within a reasonable time-limit, in order to decide on the surrender of the arrested.¹⁷⁸ This standard would be perhaps politically acceptable, because it would be non-binding and consistent with rule of law standards of all liberal democracies.

As for the duty to state reasons, one possibility would be to introduce it directly at Interpol level – at least when the notice is issued after the settlement of a dispute on it (as in the AMIA case). This duty would bring about a legitimacy-enhancing effect: if a notice is based on openly stated and detailed reasons, it would be easier for member states to process the request (simplification effect) and harder for them not to honor the notice (compliance-enhancing effect). However, most – if not all – the reasons stated in the red notice could be only based on reasons provided from national investigating authorities. Therefore, national requests too could/should be subjected to the same duty, by means of an Interpol standard. Treaties on extradition could be used as guidelines. They, in fact, require the requesting party to provide a more or less detailed statement of the offences for which extradition or the provisional arrest is requested.¹⁷⁹ This, in turn, would strengthen the legitimacy of the process and enable peer accountability among members.

Strictly related to the latter point is the duty to disclose relevant information. In the field of police cooperation the troubling nature of such duty cannot be overstated: some states restrict information on certain criminal matters (terrorism, for instance), while others are simply unwilling to share most of them with the rest of the (police) world. Interpol rules already provide the possibility for a member to circulate warrants or other information only to certain other

¹⁷⁸ See, for instance, the European arrest warrant regime, stating that “the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person” and that “where in specific cases the European arrest warrant cannot be executed within the time limits (...) the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days” (Article 17 (3) and (4) of Council Framework Decision 2002/584/JHA).

¹⁷⁹ See, for instance, Article 12 (2) of the European Convention on Extradition, imposing on the requesting party the duty to set out “as accurately as possible” the time and place of commission of the offence and its legal descriptions. Article 11 of the Inter-American Convention on Extradition is less demanding as to the content of the documents supporting a request for extradition.

members.¹⁸⁰ However, if members do not share information, not only the Interpol's duty to state reasons loses significance, but also the validation of the arrest in the country where the apprehension happened becomes impossible.¹⁸¹ Therefore, one possibility is to set a standard requiring the requesting states to share all the information that justify the warrant not only with the requested party (the state where the apprehension happens), but also with Interpol (as a general rule or at least as exceptional duty, when disputes between member states arise). In the latter case, the relevant information should be sent *prompt*, so as to allow a speedy validation of the arrest.¹⁸²

¹⁸⁰ Article 8 of the Processing Rules.

¹⁸¹ Doubtless, these standards would make the procedure to request a red notice well more demanding for member states. Public prosecutors would not be happy to know that they have to specify the reasons for a warrant and even less happy if they have to disclose some evidence. They could rather decide to rely on existing bilateral and multilateral treaties. Yet, in so doing, they would lose the advantage of using Interpol's unique communication system (they should start sending fax or emails to every single state), and would also lose the advantage stemming from the *de facto* quasi-universal recognition of Interpol-sponsored notices.

¹⁸² Admittedly, it is in the interest of the requesting state to promptly send sufficient evidence for validation, because otherwise the suspect can be freed after the deadline for preventive detention expires. If this happens, though, also international police cooperation suffers: police and judicial resources of a foreign system would have been wasted and arguably the reciprocal trust between the two jurisdictions involved would be jeopardized. It is, thus, advisable the adoption of a rule similar to Article 16 (4) of the European Convention on Extradition, which states: "Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest." By contrast, 60 days is the span of time allowed by Article 14 (3) of the Inter-American Convention on Extradition. More generally, Article 5 (1) (f), of the European Convention on Human Rights states that "No one shall be deprived of his liberty save in the [case of] the lawful arrest or detention of a person (...) against whom action is being taken with a view to deportation or extradition." Despite the fact that this provision does not require the parties to provide a time limit for the detention pending extradition proceedings, the European Court of Human Rights has acknowledged the right to an expedient procedure (*Chahal v. United Kingdom*, 15 November 1996, para. 113), although, while enforcing the right, the European Court has held that four months do not amount to an excessively long period of custody in view of extradition, when there is no reason to believe that the authorities acted without due diligence (*Borodovskiy v. Russia*, 8 February 2005, para. 50). On the rights of the individual during extradition in the

Finally, judicial review. As mentioned, it is already available at national level, in the form of validation of the arrest. Nonetheless, the Kazakh case tells us that it comes too late, after the infringement of a fundamental freedom has already happened. Moreover, the AMIA case shows that Interpol adjudicates inter-state disputes over the issuing of red notices, but that Interpol's institutions are ill-suited to play such an arbitral role. The political salience of those disputes threatens the imperative of political neutrality, especially since terrorism-related crimes have been included in Interpol's field of action. The establishment of an international court (or the extension of the ICJ mandate over such issues), though, would trigger a process of "legalization" that not only conflicts with the governance ethos of the organization, but would also be perceived as an attempt against national sovereignty in police and criminal matters.

A possible compromise would be to strengthen the CCF or to establishment a new independent administrative body – a panel of independent legal experts – with consultative powers. The French model of "justice retenue", applied to the *Conseil d'État* from 1800 to 1872, could be a source of inspiration. By that time, the *Conseil d'État* was not recognized as a judicial body, but rather a consultative body of the government on administrative controversies. Nonetheless, it exercised a judicial function, being its advice always followed by the government.¹⁸³

Following this model, Interpol panel would intervene non only on demand of the wanted person,¹⁸⁴ but also *ex officio* in the dispute settlement stage. At that level, the independent body would not adjudicate disputes, but rather advise Interpol's main bodies once a dispute arises, providing them with opinions based on legal grounds (of course, this would imply the acceptance of the duty of disclosure, as above defined). Such a "soft" legalization of Interpol's disputes settlement system would be immensely beneficial to the cherished

European context, see Council of Europe, EXTRADITION: EUROPEAN STANDARDS 97-132, espec. 101-102 (2006).

¹⁸³ See, on the 1872 reform, Vincent Wright, *La réorganisation du Conseil d'Etat en 1872*, 25 ETUDES ET DOCUMENTS DU CONSEIL D'ETAT 21 (1972). More generally, on the evolution of the Conseil d'Etat since the 1789 French Revolution, F. Burdeau, *HISTOIRE DU DROIT ADMINISTRATIF (DE LA REVOLUTION AU DEBUT DES ANNEES 1970)* 89 (1995).

¹⁸⁴ As it is already the case when the CCF is asked to process individual requests according to Article 1 (a) and 4 (a) of the Control Rules: see *supra*, Section III.1.2.

imperative of neutrality: the ground for adjudication would not be political anymore.¹⁸⁵

A further complementary step would be the creation of a network of national independent units as decentralized arms of the central independent panel. The case of the Europol's Joint Supervisory Body could be taken as a model. It is an independent body that has the task of reviewing "the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and utilization of the data held by Europol."¹⁸⁶ This body is the apex of a network of national supervisory bodies: just like the joint supervisory body monitors the activities of the European central offices of Europol, the national supervisory bodies are established to check the activities of Europol's national units¹⁸⁷. Moreover, the joint supervisory body consults and closely cooperates with its national "arms" (the national supervisory bodies) when an individual requests to ascertain whether Europol and its national units have processed her personal data in a lawful and accurate manner.¹⁸⁸

If a similar decentralized network of national supervisory bodies would be established under the coordination of the CCF or any other Interpol's independent supervisory body, such a network would be able to control the processing of notices and information by Interpol and the national bureaus, to report on violation to the Secretary General and to process individual requests concerning data collection, storage, process and use by Interpol.¹⁸⁹ A similar arrangement not only would meet the main concerns related to the

¹⁸⁵ As Sabino Cassese, *Regulation, adjudication and dispute resolution beyond the state*, (on file with the author), at 18: "The process of judicialization should not be over-emphasized, because there is a strong continuity between traditional diplomatic negotiation and the new judicial dispute settlement."

¹⁸⁶ Article 24 (1) of the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention).

¹⁸⁷ According to Article 23 (1) Europol Convention, each national supervisory body has the task "to monitor independently, in accordance with its respective national law, the permissibility of the input, the retrieval and any communication to Europol of personal data by the Member State concerned and to examine whether this violates the rights of the data subject."

¹⁸⁸ On the rights of access and claim granted to the individuals whose personal data are at stake, see Articles 19 (7), 23 (2) and 24 (4) of the Europol Convention.

¹⁸⁹ Article 24 of Europol Convention.

right of informational self-determination, but would also be beneficial to the reciprocal trust between members.

The mentioned proposals inevitably involve a trade-off. In particular, the imperative of national police autonomy and self-regulation would be eroded by Interpol new standards, albeit to a limited extent. In any case, that loss would be at least partially compensated by some likely potential gains: a more widespread acceptance of red notices, the possible expansion of Interpol's intelligence capacities and the development of a common regulatory platform for a more effective coordination with the heavily legalized Europol and Schengen settings would all become more feasible achievements.

On this point, two final remarks are in order. First, the mentioned proposals are based on a combination of two different techniques: one is the establishment of principles of due process at international level; the other is the setting of global standards that limit national administrative discretion when its exercise determines ultra-national effects.¹⁹⁰ Therefore, the same goal – legal accountability – can be pursued along different and mutually-sustaining paths. The second remark pertains to the distance between such pragmatic proposals and the more traditional alternatives, namely the full legalization of Interpol (to begin with, the adoption of a formal treaty basis) and the mechanic translation to the global level of national consolidated tools of legal accountability (first and foremost, independent judicial review of administrative action). This distance will perhaps be perceived by some public lawyers as betrayal of the integrity of the rule of law or, at best, as “administrative law lite.”¹⁹¹ It seems, nonetheless, consistent *a)* with the initial commitment to take the “softness” of Interpol powers seriously, *b)* with the need to accommodate normative legal concerns with the functional imperatives on which international police cooperation is built, and *c)* with the perception that legal accountability is only one of the many mechanisms of accountability that can be applied to global regimes.¹⁹²

¹⁹⁰ See Sabino Cassese, *Global standards for national administrative procedure*, 68 LAW AND CONTEMPORARY PROBLEMS 109 (2005).

¹⁹¹ Stewart, *U.S. Administrative Law*, *supra* note 45, at 104-106.

¹⁹² Grant and Keohane, *supra* note 44, at 35-37, detecting six mechanisms of accountability other than law, namely hierarchical, supervisory, fiscal, market, peer and public reputational accountability.

GLOBAL LEGAL STUDIES AND “SOFT” POWERS: THREE CONCLUSIONS

One of the distinguishing features of the global arena is the absence of a clear-cut distinction between legal and non-legal prescription and the blurring between binding (or “hard”) and non-binding (or “soft”) law. Part I expands on the tension between functional and normative concerns as one possible source of that blurring. In Part II, Interpol red notices are qualified as manifestation of an international administrative power that is basically “soft” (being it non-binding), but that, under certain conditions, becomes “hard” (borrowing its legal force from extradition law). In Part III, I analyze the mechanisms of legal accountability established at Interpol level, detect the main gaps and propose how to (partially) fill them. I draw from this case study three general insights.

The first one concerns the relevance of “soft” powers for the legal analysis of global governance. As observed, “the term ‘soft law’ is not much more than a slightly more elegant way of saying ‘underconceptualized law’.”¹⁹³ Why? One possible reason is that this “soft” land is where the functional goals of global governance and the normative concerns of public law more harshly compete. It is a “de-formalized” twilight zone where consolidated public law concepts are seriously challenged. “Softness” constitutes a theoretical quicksand that most legal scholars prefer to skip because it adds a further degree of complexity to the debate on the rule of law at international level.¹⁹⁴

¹⁹³ Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, in 9 GERMAN LAW JOURNAL 1869 (2008).

¹⁹⁴ See Koskeniemi, *supra* note 6, at 242-3, arguing that “de-formalization”, together with two concurrent developments (fragmentation and imperialisms), threatens the European idea that the world is on the move to a rule of law. On the issue of the rule of law in the global arena, recently, Jeremy J. Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, New York University Public Law and Legal Theory Working Papers, Paper 115/2009 (at http://lsr.nellco.org/nyu_plltwp/115) (rejecting the view that, given the absence of a world government and the impact of international law on states rather than on individuals, the rule of law would not be necessary at international level; see also Id., *The Rule of International Law*, 30 HARVARD JOURNAL OF LAW & PUBLIC POLICY 15 (2006)). For a criticism of the simplistic assumption – associated to the idea of “immaturity” of international law – that global governance and the rule of law necessarily follow diverging

Secondly, the existence of “soft” powers entails a basic question: “is a formally binding commitment to obey a rule the only means of producing rule-conforming behaviour?”¹⁹⁵ This answer cannot be properly answered from a mainstream positivist standpoint.¹⁹⁶ In that traditional view, if there is no “hard” law that creates a binding public power, then it is impossible to translate normative concerns, if any, into meaningful arguments of legality: here is where legal forms are traditionally perceived as useless; if, by contrast, an international body exerts formally binding unilateral powers, that one is the kingdom to put under the law’s empire, both to strengthen the legitimacy of the ultra-state public authority and to establish a minimum standard of protection for individuals. For those positivists, to skip the theoretical quicksand of “soft” law is easier. But for global scholars this kind of legal positivism does not hold,¹⁹⁷

paths, Sabino Cassese, *IL DIRITTO GLOBALE. GIUSTIZIA E DEMOCRAZIA OLTRE LO STATO* 31-47 (2009). See also, among other influential contributions, Sabino Cassese, *The globalization of law*, 37 *NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS* 973 (2005); David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 *LAW AND CONTEMPORARY PROBLEMS* 127 (2005); Gordon Silverstein, *Globalization and the Rule of Law: ‘A Machine that Runs of Itself?’*, 1 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 429 (2003); Martin Shapiro, *Globalization of Law*, 1 *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES* 37 (1993).

¹⁹⁵ Cassese, *supra* note 8, at 765.

¹⁹⁶ By mainstream positivism I mean voluntaristic or constrained theories of law, which emphasize that law is what law-makers want it to be and, hence, that it implies a connection with sovereignty and command. This Hobbesian or Austinian approach, transposed to the international level (where it is mostly associated with Jellinek and Triepel), identifies the will of the law-makers (the states) with “hard” international law, as qualified in Article 38 of the International Court of Justice statute. In this perspective, “soft law” is neglected: either it is dismissed as mere “fait juridique” (d’Aspremont, *supra* note 97) or, at best, acknowledged as undesirable (see Prosper Weil, *Towards Relative Normativity in International Law?*, 77 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 413 (1983) and Jan Klabbers, *The Undesirability of Soft Law*, 67 *NORDIC JOURNAL OF INTERNATIONAL LAW* 381 (1998)). See also Eyal Benvenisti, *‘Coalitions of the Willing’ and the Evolution of Informal International Law*, in *‘COALITIONS OF THE WILLING’: AVANTGARDE OR THREAT?* 1 (Christian Callies, Georg Nolte & Peter-Tobias Stoll eds., 2006).

¹⁹⁷ This does not imply an integral rejection of legal positivism by global administrative law. See Kingsbury, *supra* note 8, esp. at 27-31, proposing a “social fact” conception of law as an extension of Hartian positivism, assumed as compatible with global administrative law, in opposition to traditional (Hobbesian-Austinian) positivism. See also Benedict Kingsbury, *International Law as Inter-Public Law*, in *MORAL UNIVERSALISM AND PLURALISM* 167

since it does not serve the purpose of studying heterogeneous global regimes and the development of common principles and rules (soft ones included).¹⁹⁸

The third issue is *if* and *how* to “legalize” a “soft” power once we acknowledge its legal relevance. What if we face a power that is non-binding, does not fit into any classic category of public law and, yet, ultimately affects individual rights: how to “legalize” such an atypical manifestation of public authority? How appropriate would be to put it under the reach of the rule of law? Isn’t this a case where the legal discourse hits its own borders and should defer to competing functional rationales?

In addressing this issue, global administrative law and the competing public international law approach largely converge.¹⁹⁹ Both maintain that public law can play – at least in part and with some adaptations – its traditional dual role of enabling and limiting public power also when it is “soft” and international. Both claim, in fact, that a relative concept of normativity is necessary to overcome the stark dichotomy binding/non-binding and to fully appreciate the legal salience of “soft” instruments of law.²⁰⁰ Moreover, both reject

(Henry S. Richardson and Melissa S. Williams eds, 2009). For a discussion of Hart’s concept of law in an international law perspective, Patrick Capps, *Methodological Positivism in Law and International Law*, in *LAW, MORALITY, AND LEGAL POSITIVISM* 9 (Kenneth E. Himma ed., 2004).

¹⁹⁸ See Cassese, *supra* note 8, at 762, observing – with regard to global (administrative) law studies – that “a scholarly endeavor of this sort has not been undertaken since the 17th century. Indeed, ever since the attack from legal positivism led to the collapse of natural law approaches to the discipline, law has been conceived of as exclusively the product of nation-states, with international law conceptualized mainly on the basis of ‘contractual’ relations among them.”

¹⁹⁹ On public international law, see Bogdandy, Dann and Goldmann, *supra* note 8. See also Eberhard Schmidt-Aßmann, *The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship*, 9 *GERMAN LAW JOURNAL* 2061 (2008) and the volume *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS* (Armin von Bogdandy *et al.*, 2010) (collecting essays and case-studies conducted within that theoretical framework).

²⁰⁰ See Goldmann, *supra* note 194. See also Kingsbury, *supra* note 8, at 27: “Whereas positivist thought within a unified legal system has focused on the binary validity/invalidity, or binding/non-binding, the absence of a very organized hierarchy of norms and institutions in global governance, and the dearth of institutions with authority and power to determine such questions in most cases, means the actual issues in global administrative law often go to the weight to be given to a norm or decision.”

the positivist *caveat* not to promote “legal spill-overs”, that is, not to conflate legal and non-legal discourses. Here is where positivism still poses a major challenge to global studies. Yet, global scholars contend that this concern is misplaced, especially (but not exclusively) when it is advanced in the global arena.²⁰¹ The main effort should be, rather, devoted to elaborate strategies of “legalization” or “gap-filling” that are consistent with the specific legal salience of the public power at stake.²⁰²

In conclusion – and here is the third insight I draw from this case study – the answer to the previous question (“how to treat soft powers”) depends on the kind of legal lenses employed. Those who shape their quest for public law at international level in a positivist fashion risk either to overlook relevant “soft” powers (because they lack a legal basis), or, at the opposite, to armor them into an ill-suited legal cage (commanded by the imperative to re-establish accountability to states). By contrast, global administrative law seems well equipped both to capture the various degrees of “softness” pertaining to global powers, and to sew legal clothes that more appropriately fit informal global institutions and powers (by squaring functional needs with the protection of individual rights). In so doing, global administrative law, compared to more ambitious approaches,²⁰³ seems to perform a modest, while potentially not less effective, role in promoting the rule of law beyond the state.

²⁰¹ Objections may be condensed in two questions: *a)* does the legal discourse have fixed or clearly defined boundaries, so that no interplay with competing wisdoms is allowed and indeed beneficial? *b)* Is it really necessary (and meaningful) to prevent “legal spill-overs” in a global arena where political dynamics systematically interferes with legal ones and where, as a result, the two spheres largely overlap?

²⁰² See Stewart, *U.S. Administrative Law*, *supra* note 45 (distinguishing between top-down and bottom-up mechanisms of legal accountability). See also Goldmann, *supra* note 194, at 1879-1905 (advancing a classification of “standard instruments of international public authority” and detecting some common elements of their legal regimes).

²⁰³ Bogdandy, Dann and Goldmann, *supra* note 8, at 1390-1395, describe their methodology as a combination of three approaches: constitutional law, administrative law and institutional international law. In my view, the main divergence between this approach and global administrative law concerns the different emphasis put on the role of states. Global administrative law scholars openly reject the “state-as-a-unit” paradigm and tend to conceive the global context as an arena where states compete with other private and public actors (see Kingsbury, Krisch and Stewart, *supra* note 10; Cassese, *supra* note 10; Nico Krisch and Benedict Kingsbury, *Introduction: Global Governance and*

Global Administrative Law in the International Legal Order, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1, 10 (2006), stressing the tension between global administrative law and the classical models of consent-based inter-state international law). By contrast, proponents of public international law defend a state-centered approach both at terminological and at conceptual level. As for terminology, the traditional word “international” is preferred to the word “global”, which is intended to highlight the vanishing of a sharp separation between the domestic and international legal orders (see Cassese, *supra* note 10, at 684). At conceptual level, a state-centric vision surfaces where global governance is conceived “as peaceful cooperation between polities, be they states or regional federal units, a cooperation which is mediated by global institutions (...). These are propelled by national governments (...) [and] would in turn be conscious of their largely state-mediated (and thus limited) resources of democratic legitimacy and respectful of the diversity of their constituent polities.” (Bogdandy, Dann and Goldmann, *supra* note 8, at 1400; in the same vein, Schmidt-Abmann, *supra* note 199, at 2066-2069).